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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 399

UNITED STATES, PETITIONER,

vs.

ARCHIE BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 18, 1964
CERTIORARI GRANTED NOVEMBER 9, 1964

SUPREME COURT OF THE UNITED STATES

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UNITED STATES, PETITIONER,

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ARCHIE BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
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[fol. a]

**IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.**

Criminal No. 37934

Violation: 29 U.S.C. 504
Labor-Management Reporting and Disclosure Act of 1959

UNITED STATES OF AMERICA, Plaintiff,

v.

ARTIE BROWN, also known as ARCHIE BROWN, Defendant

INDICTMENT—Filed May 24, 1961

The Grand Jury charges:

From in or about October, 1959 and up to and including the date of this indictment, in the Northern District of California, ARTIE BROWN, also known as ARCHIE BROWN, did unlawfully, knowingly and wilfully serve as a member of an executive board of a labor organization, namely, Member of the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union, while a member of the Communist Party, in wilful violation of Title 29, United States Code, Section 504.

A True Bill,

Charles K. Garner, Foreman.

Laurence E. Dayton, United States Attorney.

Laurence E. Dayton, United States Attorney, Attorney
for Plaintiff.

[fol. b]

No. 37934

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION

THE UNITED STATES OF AMERICA

vs.

ARTIE BROWN, also known as ARCHIE BROWN.

INDICTMENT

Violation: Title 29, U.S.C. Section 504—Labor Management Reporting and Disclosure Act of 1959.

A true bill,

Charles K. Garner, Foreman.

Filed in open court this — day of —, A.D. 19—.

Bail, \$5,000.

—, —, Clerk.

[File endorsement omitted]

INDICTMENT

UNITED STATES

v.

ARTIE BROWN, also known as ARCHIE BROWN.

Violation: Title 29, U.S.C. Section 504—Labor Management Reporting and Disclosure Act of 1959.

Penalty: May be imprisoned not more than one year, or fined not more than \$10,000 or both.

True Name: Archie Brown.

[fol. c]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 37934 Crim.

[Title omitted]

MOTION TO DISMISS—Filed June 14, 1961

Comes now the defendant above-named, and moves the Court for its order dismissing the indictment herein upon the ground and for the reasons that:

1. The indictment does not state facts sufficient to constitute an offense against the United States, in that, among other grounds:

(a) It fails to allege that the defendant encouraged or had the power to encourage, or that there was any clear and present danger that defendant would or could encourage, political strikes or any interruptions or obstructions to interstate commerce.

(b) It fails to allege that the Executive Board of Local 10 encouraged, or had the power to encourage, or that there was any clear and present danger that it would or could encourage political strikes or any interruptions or obstructions to interstate commerce.

[fol. d] (c) It fails to allege how or in what manner the defendant served as a member of the Executive Board of Local 10.

(d) It fails to allege how or in what manner the defendant was or became a member of the Communist Party.

2. The statute upon which the indictment is based (29 USC 504) is unconstitutional on its face in that, among other grounds:

(a) It deprives the defendant of freedom of speech, press and association guaranteed to him by the First Amendment to the Constitution of the United States.

(b) It imposes an unconstitutional condition (i.e. the foregoing of membership in the Communist Party) upon

the exercise by defendant of a constitutional right (i.e. the right to be elected to a position in a trade union.)

(c) It constitutes a bill of attainder and ex post facto law, contrary to the provisions of Article I, Section 9(3) of the Constitution of the United States.

(d) It does not set up an ascertainable standard of guilt in that, among other things, it does not define the terms "served", "member", "Communist Party", and "executive board", and thereby violates the provisions of the Fifth and Sixth Amendments to the Constitution of the United States.

(e) It deprives the members of a labor organization of their constitutional right guaranteed by the First Amendment to the Constitution of the United States, to elect whomsoever they choose to membership on the Executive Board of their organization.

3. The statute upon which the indictment is based (29 USC 504) is unconstitutional as applied herein in that, among other grounds:

(a) There is no requirement in the statute nor is it alleged in the indictment that the defendant is an "active" member of the Communist Party, or that the defendant had any "personal knowledge" of any unlawful aims and [fol. e] objectives of the Communist Party, or that the Communist Party had any unlawful aims or objectives during the period of defendant's alleged membership therein.

(b) There is no requirement in the statute, nor is it alleged in the indictment, that the defendant had as his object and purpose the utilization of his membership on the Executive Board to permit any unlawful conduct or activity by the said Board, or to induce or attempt to induce the said Board to engage in political strikes or to create any burdens or obstructions to interstate commerce, or that there was any clear and present danger that he would or could do so.

(c) There is no requirement in the statute, nor is it alleged in the indictment, that the defendant, while serving as a member of the Executive Board, had any power to influence the said Board to engage in political strikes or to disrupt or place burdens upon interstate commerce, or

that there was any clear and present danger that he would or could do so.

(d) There is no requirement in the statute, nor is it alleged in the indictment, that the said Executive Board had power to cause political strikes or to create disruptions or to place burdens upon interstate commerce, or that there was any clear and present danger that he would or could do so.

(e) There is no allegation in the indictment that the Executive Board of ILWU Local 10 is a "governing body" as required by 29 USC 504.

4. The indictment conflicts with the guarantees contained in Section 7 of the National Labor Relations Act as amended (29 USCA 157), and with Section 4(f) of the McCarran Act (50 USCA 783(f)).

Dated: June 14, 1961.

Respectfully submitted, Gladstein, Andersen, Leonard & Sibbert, /s/ By Richard Gladstein Attorneys for Defendant.

[fol. f] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Present: the Honorable A. C. Wollenberg, District Judge

Cr. 37,934

UNITED STATES OF AMERICA, Plaintiff,

vs.

ARCHIE BROWN, Defendant.

ORDER DENYING MOTION TO DISMISS—October 25, 1961

This case came on regularly this day for a hearing on the motion to dismiss and for plea. The defendant Archie Brown was present in Court with Richard Gladstein, Esq., and Norman Leonard, Esq., his attorneys. Cecil Pooie, Esq., United States Attorney was present for and on behalf of the U. S.

After hearing arguments by counsel, it is Ordered that the defendant's motions to dismiss, etc., be and the same is hereby denied.

The defendant Archie Brown was called for judgment and thereupon entered a plea of "Not Guilty", which said plea was Ordered entered. After hearing Counsel, it is Ordered that this case be and the same is hereby continued to November 1st, 1961, to be set for trial. It is further Ordered that the defendant be released on the bond heretofore deposited herein.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. g] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Present: the Honorable A. C. Wollenberg, District Judge

Cr. 37,934

[Title omitted]

MOTION FOR MISTRIAL AND DENIAL THEREOF—March 29, 1962

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial hereof was thereupon resumed. Opening statements were made by the respective counsel. Robert Rohatch was sworn and testified for and on behalf of the U. S. Mr. Poole introduced in evidence and filed U. S. exhibits Nos. 1, 2, 3, 4, 5, 6, 7 & 8. It was stipulated that Ex. No. 7 could be substituted with photostat and the original withdrawn. Mr. Gladstein made a motion to strike certain testimony and a motion for a mistrial, which motions were Ordered denied. Defendant's offer of proof as to strike and lockout was rejected. The hour of adjournment having arrived, the Court admonished the jury and continued the further trial of this case to March 30th, 1962, at 10:00 a.m.

Clerk's Certificate to foregoing paper omitted in printing.

7

[fol. h] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Present: the Honorable A. C. Wollenberg, District Judge

Cr. 37,934

[Title omitted]

MOTION TO DISMISS AND FOR ACQUITTAL AND DENIAL
THEREOF—April 3, 1962

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial hereof was thereupon resumed. Upon stipulation of counsel and out of the presence of the jury, the U. S. rested. Mr. Gladstein made a motion for judgment of acquittal and a motion to dismiss, and after hearing counsel, it is Ordered that the motions be and the same are hereby denied. Defendant's offer of proofs as to testimony proposed to be offered was rejected by the Court. The hour of adjournment having arrived, the Court ordered the further trial hereof be continued to April 4th, 1962, at 10:00 a.m.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. i]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Criminal No. 37934

UNITED STATES OF AMERICA, Plaintiff,

vs.

ARCHIE BROWN, Defendant.

VERDICT—April 5, 1962

We, the JURY, find ARCHIE BROWN, the defendant at the
bar:

Guilty of the offense as charged in the Indictment.

Dated: April 5, 1962.

Signed: John J. Zanini, Foreman.

[fol. j] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 37934

UNITED STATES OF AMERICA,

v.

ARCHIE BROWN

JUDGMENT AND COMMITMENT—May 4, 1962

On this 4th day of May, 1962 came the attorney for the
government and the defendant appeared in person and¹
with counsel.

¹ Insert "by counsel" or "without counsel; the court
advised the defendant of his right to counsel and asked
him whether he desired to have counsel appointed by the
court, and the defendant thereupon stated that he waived
the right to the assistance of counsel."

It is Adjudged that the defendant has been convicted upon his plea of ² NOT GUILTY and a VERDICT of GUILTY after trial by jury, of the offense of Violation of Title 29 U.S.C. § 504, Labor Management Reporting and Disclosure Act of 1959, as charged ³ in Indictment of ONE COUNT, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ⁴ SIX (6) MONTHS.

It is Adjudged that ⁵—

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Albert C. Wollenberg, United States District Judge.

² Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

³ Insert "in count(s) number " if required.

⁴ Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

⁵ Enter any order with respect to suspension and probation.

Judgment & Commitment Filed This 4th Day of May, 1962
The Court recommends commitment to:⁶

James P. Welsh, Clerk.

By: (Illegible) Deputy Clerk.

[fol. k] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 37934 Crim.

[Title omitted]

DEFENDANT'S PROPOSED JURY INSTRUCTIONS—Filed June 4,
1962

Prefatory Note

In most instances the proposed instructions which follow either suggest a supporting citation, or are of standard character requiring no citation.

With reference to the instructions dealing with specific intent under this statute, the objective which the statute seeks to achieve, the conduct which the statute seeks to prohibit, and related instructions, the chief sources of authority are:

A.C.A. v. Douds, 339 U.S. 382.

Scales v. United States, — U.S. —, 6 L.Ed.2d 782.

⁶For use of Court wishing to recommend a particular institution.

[fol. 1] DEFENDANT'S PROPOSED INSTRUCTION No. 3.

In my questions to you at the outset of this case, I advised you that it would be your task to find, based upon the evidence to be submitted in this case, whether the defendant was during the indictment period a member of the Communist Party and whether during the same period he served upon the Executive Board of the Union, and that it would be your duty to determine not only whether each of these things occurred, but also whether they occurred unlawfully, knowingly and wilfully, as set forth in the indictment which I read to you. In deciding these issues of fact, you are required to accept from me and apply the instructions of law which establish whether or not such facts, if found by you to be true, would constitute a crime under this statute.

In adopting this law, the Congress of the United States intended to impose criminal penalties against persons seeking to incite trade unions into calling political strikes. The method adopted by Congress to meet that problem, was to establish criminal penalties against those persons who might infiltrate union organizations, not for the purpose of supporting or furthering trade union objectives, such as advocating change by democratic methods, but rather to make trade unions a device by which the commerce and industry of our country might be disrupted whenever the dictates of political policy required such action.

In applying the statute to any individual accused of violating it, therefore, it is necessary that the prosecution shall prove that the particular defendant did in fact infiltrate a trade union organization for the stated prohibited purpose, and with the specific intent to achieve that purpose.

GIVEN:

REFUSED:

MODIFIED:

[fol. m] DEFENDANT'S PROPOSED INSTRUCTION No. 4

Bearing in mind, as I have told you, that it was the intention of Congress in adopting this law to impose criminal penalties against persons who infiltrated into trade unions for the purpose of using executive authority in the unions for the purpose of disrupting commerce, such as by the calling of political strikes not justified by bona fide trade union objectives, it will be a material element in this case relating to the guilt or innocence of the defendant, and particularly as to his state of mind and the existence or non-existence of the specific intent required in order to convict, for you to determine from the evidence whether he concealed or sought to conceal from the Union or the members thereof the fact that he was a member of the Communist Party. If you find from the evidence that he did in fact conceal or seek to conceal such party membership from his trade union, that is a fact which you will consider as indicating an unlawful intent on the part of the defendant, to be given such weight as by all the evidence you consider it justifies. If on the other hand you find that the defendant was, by his own statements and conduct, or from other sources, known by the members to be, or believed by them to be, a member of the Communist Party during the indictment period, then you shall consider such fact, if you find it to be a fact, as weighing against the possession by the defendant of that criminal state of mind and specific intent required to convict, and you will give such finding, if you make it, such weight as under all the circumstances and evidence in the case you find it to deserve.

GIVEN:

REFUSED:

MODIFIED:

[fol. n] DEFENDANT'S PROPOSED INSTRUCTION No. 5

Furthermore, before you can convict the defendant you must find beyond a reasonable doubt that the Board on which the defendant served was an Executive Board as I shall define that term to you and that it had the power to engage in activities which might disrupt interstate commerce.

You are instructed that an Executive Board means a governing body. A governing body is one which makes and carries out rules of action which it has the power to impose upon those whom it governs. To govern means to rule over; it means to control by authority. An executive body is a body which has the power to cause laws to be obeyed. If the evidence fails to convince you beyond a reasonable doubt that the Board upon which the defendant served was such a body, that is, that the Board did not have executive or similar governing powers in the sense that I have defined them to you, then you must find that the defendant could not have utilized his service upon the Executive Board as a means of causing disruptions of commerce, and this would be an essential fact in determining whether or not the defendant was guilty or innocent of the charge here.

GIVEN :

REFUSED :

MODIFIED :

[fol. 6] DEFENDANT'S PROPOSED INSTRUCTION No. 5A

In order to convict the defendant you must find from all the evidence beyond a reasonable doubt that between October 1, 1959, and May 24, 1961, the defendant unlawfully, knowingly and willfully served as a member of the Executive Board of Local 10, while a member of the Communist Party.

In order to find that the defendant served on the Executive Board "unlawfully, knowingly and willfully" as alleged in the indictment, you are instructed that you must find from the evidence that the defendant served on that Board with the specific intent of using his service on it as a means of creating a disruption of interstate commerce.

Furthermore, you are instructed that before you can find the defendant guilty, you must find from the evidence that in serving on the Executive Board the defendant actually engaged in activities reasonably designed and calculated to bring about, and which he knew or believed would have the reasonably probable effect of bringing about, a disruption of interstate commerce, and that it was his intention, un-

lawfully, knowingly and willfully to bring about such a disruption of interstate commerce.

If the evidence does not convince you beyond a reasonable doubt that the defendant served on the Board with the specific intent which I have just defined, then he did not serve unlawfully, knowingly and willfully on the Board, and you would then be required to return a verdict of not guilty.

GIVEN:

REFUSED:

MODIFIED:

[fol. p] DEFENDANT'S PROPOSED INSTRUCTION No. 8:

You are instructed that in every crime there must be a union of act and intent. The criminal law requires that the intent be personal to the defendant. In this case the intent required, in order to render service on an Executive Board to be criminal, is the intent to use the Board as a means of disrupting interstate commerce. In other words, you must find, beyond a reasonable doubt, that so far as the defendant is concerned he personally had the specific intent to use his position on the Executive Board for the unlawful purpose which I have defined. In this connection you are instructed that in order to determine what the defendant's specific intent was, you must consider only such evidence which has been received here.

GIVEN:

REFUSED:

MODIFIED:

[fol. q] DEFENDANT'S PROPOSED INSTRUCTION No. 9

In addition to the mental element known as "intent" which must exist in all crimes, some crimes require a further mental element known as specific intent. The crime denounced by this statute is such a crime, conviction under which can be had only if there is found the requisite specific intent, and of course such intent can be found only if there is evidence establishing it to exist, or evidence from which an inference may properly and reasonably be drawn to support the existence of such specific intent.

The general criminal intent in crimes is presumed from the criminal act itself. Here, therefore, any conscious holding of union office by a person who at the same time was a member of the Communist Party would satisfy the statutory requirement of general criminal intent, if the same was done knowingly and wilfully. However, this would not be sufficient to establish the existence of specific intent. Moreover, a specific intent is not to be presumed. Its existence is a matter of fact for you as the jury, and it must be proved by the United States just as any other essential element of the case must be proved. The proof of specific intent is shown by the nature of the act, the circumstances under which it was committed, the means employed, the motives of the accused, and the relation of all these factors to the purpose of the statute which it is said the defendant violated.

Burdick, The Law of Crime, § 120.

GIVEN:

REFUSED:

MODIFIED:

[fol. r] DEFENDANT'S PROPOSED INSTRUCTION No. 10

Specific intent is that state of mind required to be found in this case, as evidenced by all the facts and circumstances revealing the expressions and conduct of the defendant during the course of his service as a member of the Executive Board of the Union. From all such evidence it will be your duty to determine whether the defendant entered upon his service as a member of the Executive Board of the Union and continued in that service with the specific intent which I have defined, and for the purposes forbidden by law as I have described them.

GIVEN:

REFUSED:

MODIFIED:

[fol. s] DEFENDANT'S PROPOSED INSTRUCTION No. 14

Before intent can be inferred from acts or statements, the acts or statements must not only be such as the intent in question would explain, but also such as may not readily and naturally be explained on the hypothesis of any other intent.

20 Am. Jur., Evidence, § 1217;
Herndon v. Lowry (1937), 301 US 242, 263, 264;
People v. Noble (1945), 68 Cal. App. 2d 792;
Hartzel v. United States (1944), 322 US 680.

GIVEN:

REFUSED:

MODIFIED: _____

[fol. t] DEFENDANT'S PROPOSED INSTRUCTION No. 15

If you find that the defendant had reason to believe and did believe that the activities in which he participated were lawful, or protected by the Constitution of the United States, then, even if said belief was mistaken, it would be your duty to acquit the defendant.

GIVEN:

REFUSED: _____

MODIFIED: _____

[fol. u] DEFENDANT'S PROPOSED INSTRUCTION No. 23

Having now placed before you the provisions of Section 504 of the Labor Management Reporting and Disclosure Act of 1959, and having told you what that law denounces, I now instruct you that if a person honestly and in good faith acted upon the advice of counsel and intended only that his acts and conduct should be lawful, he could not be convicted of a crime which involves a wilful and an unlawful intent.

Williamson v. United States, 207 U.S. 425.

C.I.T. Corporation v. United States, 150 F.2d 85, 95
 (9 Cir.).

GIVEN:

REFUSED:

MODIFIED:

[fol. v] DEFENDANT'S PROPOSED INSTRUCTION No. 24

A person has the legal right to act and rely upon the advice of a reputable attorney, if he receives, acts and relies upon that advice in good faith. If you find that the defendant's acts in this case were based upon his honest belief in the correctness of his attorney's advice, this is a matter which you may consider in determining the guilt or innocence of defendant.

Shushan v. United States, 117 F.2d 110, 119 (9 Cir.).

C.I.T. Corporation v. United States, 150 F.2d 85, 95 (9 Cir.)

GIVEN:

REFUSED:

MODIFIED:

[fol. w] DEFENDANT'S PROPOSED INSTRUCTION No. 25

Where, as here, the question is one of the defendant's intent in acting as he did, I instruct you that the good faith reliance by the defendant upon the advice of counsel is a matter of defendant to be considered by you in determining the guilt or innocence of the defendant.

Miller v. United States, 277 F.721.

Linden v. United States, 254 F.2d 560.

GIVEN:

REFUSED:

MODIFIED:

[fol. x] DEFENDANT'S PROPOSED INSTRUCTION No. 26

Inasmuch as the defendant can be found guilty of the offense charged in the indictment only if you are satisfied by evidence beyond a reasonable doubt that he had the intent to violate the law as I have previously instructed you, I further instruct you that in whatever the evidence may show he did or did not do, if he followed the counsel and advice of his attorney, in whatever he did or did not do, and if he did so in good faith and without any intent to

violate the law, it is your duty to find him not guilty or, if you have any reasonable doubt upon that question, it is your duty to give him the benefit of that reasonable doubt and find him not guilty.

Hersh v. United States, 68 F.2d 799, 806 (9 Cir.).

GIVEN:

REFUSED:

MODIFIED:

[fol. y] DEFENDANT'S PROPOSED INSTRUCTION No. 27

While it is true that the advice of an attorney is not in and of itself a defense to the commission of a crime, nevertheless it is an element to be considered in determining the good faith of the defendant. In order to constitute the crime of violating Section 504 of the statute under consideration, it is necessary that the defendant have acted unlawfully, wilfully and knowingly. In order to determine whether the defendant acted unlawfully, wilfully and knowingly, you may consider whether or not he acted and relied upon the advice of his attorneys, and if you find that he did rely upon such advice, then you may consider whether such reliance by him shows his lack of intent to violate the law. This is a matter which may be considered by you in determining the guilt or the innocence of the defendant.

Hersh v. United States, 68 F.2d 799, 806 (9 Cir.).

[fol. z]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Criminal No. 37934

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed April 6, 1962

Comes now the defendant above named and, pursuant to Fed. Rules Cr. Proc. rule 34, 18 U.S.C.A., moves that the Court arrest judgment herein since the indictment does not charge an offense against the United States.

This motion is made upon all of the pleadings, files, records, papers and transcript of proceedings in the above-entitled cause.

Dated: April 6, 1962.

Gladstein, Andersen, Leonard & Sibbett, By /s/
Richard Gladstein, By /s/ Norman Leonard, Attorneys for Defendant.

[fol. aa] Acknowledgment of service (omitted in printing).

[fol. bb] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Criminal No. 37934

[Title omitted]

MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE
FOR A NEW TRIAL—Filed April 6, 1962

Comes now the defendant and, pursuant to the provisions of Fed. Rules Cr. Proc. rule 29, 18 U.S.C.A., hereby moves for an order setting aside the verdict herein and for the entry of a judgment of acquittal herein on the ground and for the reason that the evidence is insufficient to sustain the conviction.

In the alternative, and pursuant to the same rule, the defendant moves for a new trial on the ground that this is required in the interest of justice, pursuant to Fed. Rules Cr. Proc. rule 33, 18 U.S.C.A., in that (a) the Court erred in excluding evidence offered by the defendant; (b) the defendant was prevented from having a fair trial by the constant and unwanted interruptions of his counsel's closing argument by the United States Attorney; (c) the defendant was prevented from having a fair trial by reason of the Court's comments to the jury during the course of his counsel's closing argument; and (d) the Court erred in [fol. cc] charging the jury as it did and in refusing to charge the jury as requested by the defendant, to which charge and the omissions therefrom, the defendant interposed appropriate objections as required by Fed. Rules Cr. Proc. rule 30, 18 U.S.C.A.

This motion is made upon all of the pleadings, files, records, papers and transcript of proceedings in the above-entitled cause.

Dated: April 6, 1962.

Gladstein, Andersen, Leonard & Sibbett, By /s/
Richard Gladstein, By /s/ Norman Leonard, At-
torneys for Defendant.

Acknowledgment of service (omitted in printing).

[fol. dd]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Crim. No. 37934

[Title omitted]

NOTICE OF APPEAL—Filed May 9, 1962

Name and address of appellant: Archie Brown, 1027
Brussels Street, San Francisco, California.

Name and address of appellant's attorneys: Gladstein,
Andersen, Leonard & Sibbett, 240 Montgomery Street, San
Francisco 4, California.

Offense: Violation of Section 504 of the Labor-Management
Relations Act of 1959 (29 USCA 504).

Concise statement of judgment or order, giving date, and
any sentence: Guilty, sentenced to six months imprisonment,
on May 4, 1962.

Name of institution where now confined, if not on bail:
On bail.

I, the above-named appellant, hereby appeal to the United
States Court of Appeals for the Ninth Circuit from the
above-stated judgment.

Dated: May 7, 1962.

Archie Brown.

[fol. ee] Acknowledgment of service (omitted in printing).

[fol. ff]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Crim. No. 37934

[Title omitted]

STATEMENT OF POINTS ON APPEAL—Filed May 9, 1962

Comes now the defendant above-named, and pursuant to the rules in such cases made and provided, hereby states his points on appeal as follows:

1. The statute under which his conviction was procured is unconstitutional on its face as violative of the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

2. The statute under which his conviction was procured is unconstitutional as applied to this defendant, as violative of the First, Fifth, Ninth and Tenth Amendments to the Constitution of the United States.

3. The evidence is insufficient to sustain the conviction.

4. The trial court committed error in excluding evidence offered by the defendant.

5. The trial court committed error in instructing the jury as requested by the prosecution.

6. The trial court committed error in refusing to instruct [fol. gg] the jury as requested by the defendant.

7. The United States Attorney was guilty of prejudicial misconduct during the course of defendant's trial.

8. The trial court committed error in refusing to declare a mistrial when requested to do so by the defendant because of the prejudicial misconduct of the United States Attorney.

9. The trial court committed error in denying defendant's motion for a judgment of acquittal at the conclusion of the Government's case, and again at the conclusion of all the evidence.

10. The trial court committed error in denying defend-

23

ant's motion for a judgment notwithstanding the verdict,
or in the alternative for a new trial.

Dated: May 8, 1962.

Gladstein, Andersen, Leonard & Sibbett, By Norman
Leonard, Attorneys for Defendant.

Acknowledgment of service (omitted in printing).

[Pol. hh] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

No. 37934

D. C. Form No. 100.

CRIMINAL DOCKET

THE UNITED STATES,

vs.

ARTIE BROWN, aka, ARCHIE BROWN, Age 49

ARCHIE BROWN—TRUE NAME

Attorneys For U. S.: Cecil Poole, U. S. Atty. & Paul
Vincent.

Attorneys For Defendant: Norman Leonard, Richard
Gladstein (10-24-61).

29 USC 504—Labor Management Reporting and Disclosure
Act of 1959

1 Count

Date

DOCKET ENTRIES

JS-2

JS-3

1961

- | | |
|--------|--|
| May 24 | 1. Ord Indictment placed on Secret file and bail set at \$5,000.00 Issued Bench warrant. |
| 25 | 2. Filed Appearance Bond, returnable May 31st, \$5,000.00 bond. |

Date

DOCKEY ENTRIES

1961

- May 26 3. Filed Bench Warrant, executed, 5-24-61.
31 Deft. arragnd; Ord. case con to June 14th for plea. Sweigert.
- June 9 4. Filed Mo for Bill of Particulars.
14 Ord. Mo to be submitted on June 29, 1961; Ord con to July 6th for Plea & Hearing on motions. Sweigert.
5. Filed Mo for Issuance of a Pre-trial Subpoena Rule 17(c).
6. Filed Mo for Discovery and Inspection Rule 16.
7. Filed Motion to Dismiss.
- 29 8. Filed letter of Richard Gladstein to US Atty Clancy agreeing to the latter's suggestion that argument of the mos. be con to Aug. 24th.

[fol. ii]

- July 6 Ord con to Aug 24th in accordance with letter on file dated 6-28-61. Sweigert.
- Aug. 10 Deft Ex Parte: Continued From August 24th for Hrg. on Mo. to Dismiss; Continued to Sept. 5th for Gov't's. answer to Mo to Dismiss and continued to Sept. 12th for Hrg on Mo. to Dismiss.
- Sept. 5 9. Filed points & auth. of U. S. in opposition to deft motions.
- 12 Ord memos filed in 14-14 days, matter con to Oct. 24th, on motions and to plead. Wollenberg.
- 26 10. Filed Memorandum in Support of Deft's. Motions.
- Oct. 10 11. Govt: Filed Supplemental Memo of the U. S. in Opposition to Deft's. Motion to Dismiss the Indictment.
- 24 On stipulation of counsel continued to Oct. 25th for Hrg. Wollenberg
12. Filed Stipulation Continuing Argument of Motions may be con to Oct. 25th.
- 25 After arguments by counsel Ord. deft's Mo. to Dismiss for Bill of Parts & for Discovery Denied; deft pleaded Not Guilty to indictment; Ordered con to Nov. 1st to be set. Wollenberg.

Date

DOCKET ENTRIES

1961

- Nov. 1 Ord con to Nov. 15th to be set (Gladstein Not present). Wollenberg.
 15 Ord con to January 22nd, 1962 for Jury trial.

1962

- Jan. 4 Ord this case now appearing on Calendar Jan. 22nd for trial, be continued to February 26th for trial.
 Feb. 16 Ord con to March 26th for trial.
 Mar. 7 13. Filed Order Authorizing Deft to Leave Jurisdiction for a period to March 24, 1962. Sweigert.
 20 14. Filed Order that pursuant to Rule 17(c) of the FRCP the documents and other items designated in the attached subpoena Walter Nelson be produced before the Clerk of the Court at 10:00 A. M. on March 23, 1962; further Ordered that at the aforesaid time and place the said documents and other items may be inspected by the U. S. through its attorneys. Sweigert.
 21 15. Filed Order that the documents and other items designated in the attached subpoena duces tecum and directed to Robert Rohatch be produced before the Court at a time prior to the trial of the above entitled case which is scheduled to begin on March 28th so that U. S. Attys may inspect them; fur Ord that pursuant to Rule 17(c) the said documents be produced before the clerk of this Court at 10:00 A. M. on March 23, 1962. Sweigert.
 23 On ex parte motion of Richard Gladstein Ordarg on Mo to suppress subpoena con to March 26th at 2:00PM. Sweigert.
 26 16. Filed Subpoena to Testify, executed, 3-22-62.
 17. Filed Subpoena to Produce Document, executed, 3-22-62.

Date
[fol. jj]

DOCKET ENTRIES

1962

- Mar. 26 18. Govt: Filed Order of March 21, 1962 together with Subpoena to Produce Document sent to Walter Nelson, executed 3-22-62.
19. Deft Brown: Filed Order of March 21, 1962 together with Subpoena to Produce Document sent to Robert Rohatch, 3-22-62.
20. Filed Memorandum of Points and Authorities in Support of Motion to Quash Subpoena.
Govt: After hearing Ord. mo to suppress subpoena be and the same is Denied; Documents to be produced for inspection by the Govt. and turned over to counsel for the defense by 12:00 o'clock Noon March 27, 1962.
- 27 Ord trial assigned to Judge Wollenberg for jury trial. Sweigert.
- 28 1. This case came on this day for jury trial; jury impanelled; one alternate picked; Ord con to March 29th for fur trial. Wollenberg.
- 29 2. Trial resumed; testimony taken evid. intro.; deft's mo to strike certain testimony and Mo for Mistrial were Denied; Deft's offer of proof as to strike & lockout was rejected; Ord fur trial con to March 30th. Wollenberg.
- 30 3. Trial resumed; testimony taken and evid introd; deft's mo to produce reports was Granted: Certain Other Reports Were Submitted In Camera; Ord the fur trial of this case con to Monday April 2, 1962. Wollenberg.
- Apr. 2 Deft involved in an auto accident on his way to Court, Ord fur trial con to April 3rd at 2:00 PM. Wollenberg.
- 3 4. Trial resumed; Govt. rested out of presence of the jury; Ord Mo of Deft's Mo for judgt. of Acquittal and to Dismiss Denied; rejected deft's Offer of Proofs; Ord con to Apr. 4th ACW.
- 4 5. Trial resumed; testimony taken & evid introd; Ord con to April 5th for fur trial. Wollenberg.

Date

DOCKET ENTRIES

1962

- Apr. 5 6. Trial resumed; arguments by respective counsel were made; defts mo for Mistrial and Exceptions were Denied & Noted; jury's verdict Guilty as charged in indict; verdict unanimous; on mo of deft. he was released on bond; Ordered all motions be noticed and filed in five days and this matter reft to Probn. Off. & con to May 4, 1962 for hearing on Motions and for Judgment. Wollenberg.
- 6 21. Filed Verdict of Guilty as charged in Indict., formane John J. Zanini.
22. Filed Motion for Judgment of Acquittal or in [fols. kk-1] the Alternative for a New Trial (Fed. Rules Cr. Procedure rules 29 and 33, 18 USCA).
23. Filed Motion in Arrest of Judgment (Fed. Rules Cr. Proc. rule 34, 18 USCA).
- May 4 24. Entered Judgt. & Commit. (Filed May 4, 1962). Wollenberg.
On Mo of counsel for the Deft and consent of Govt the Motions and an each of them were submitted on the written record, Motions and Memos in support thereof: the Court Ordered each of the Motions Denied; Court Ordered the deft sentenced to imprisonment for a period of Six (6) Months; deft made an oral Notice of Appeal, and the deft's Motion for release on bond pending appeal was Granted in the sum heretofore posted. Wollenberg.
- 7 25. Filed Bail Bond On Appeal.
- 9 26. Filed Notice of Appeal.
27. Filed Statement of Points on Appeal.
28. Filed Designation of Record on Appeal.
- 10 Mail Notice to U. S. Atty.
Made Statement of Docket entries to the CCA.

[fol. 2] IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Before: Hon. Albert C. Wollenberg, Judge

No. 37,934

UNITED STATES OF AMERICA, Plaintiff,

vs.

ARCHIE BROWN, Defendant.

Transcript of Trial

APPEARANCES:

For the Plaintiff: Cecil F. Poole, Esq., United States Attorney, Paul Vincent, Esq.

For the Defendant: Messrs. Gladstein, Andersen, Leonard & Sibbett. By: Richard Gladstein, Esq., and Norman Leonard, Esq.

(A jury was duly impaneled and sworn—March 28, 1962.)

[fols. 3-4] MORNING SESSION, THURSDAY, MARCH 29, 1962

[fols. 5-6] OPENING STATEMENT FOR DEFENDANT

Mr. Gladstein:

[fol. 7] Now, we will offer you evidence to show that Archie Brown has been working on the waterfront, oh, for over 20 years, and that almost 20 years ago, as a matter of fact, when he sought to be placed on the registration list there, which is a list that is jointly controlled, as the evidence will show, by the employers and by the union, and on it go the names of the men who get the right to be called for jobs through the Hiring Hall. We will show that when he sought, by reason of prior years of experience on this waterfront

since 1934 or '5, to become registered as a permanent long-shoreman, he had to go through the Labor Relations Com-[fol. 8] mittee. The employers objected to registration of Mr. Brown, claiming because of his communist viewpoint—communism—and that by reason of that, the union records will show that an arbitration took place in the year 1943, and the arbitrator was Professor Alexander M. Kidd, the Dean of the School of Law at the University of California, Berkeley. And after hearing the evidence, Dean Kidd issued a ruling holding that there was no evidence to show that Archie Brown believed in force or violence to overthrow the government or anything—

Mr. Poole: Your Honor,—

The Court: Just a moment.

Mr. Poole: Your Honor, at this time I am going to interpose an objection to counsel's opening statement. I hate to do this, but this, we contend, is outside the scope of the issues of this trial. It is the Government's position that whether or not Mr. Brown did or does or will advocate or proselyte for or urge the violent overthrow of the government of the United States, or foment unlawful strikes on the waterfront, is not in issue in this case. Congress has passed a statute which makes it unlawful for a person knowingly to be a member of the Board of a union and a member of the Communist Party, and those are the issues in this case. I must object to Mr. Gladstein's remarks.

The Court: I think, Mr. Gladstein, under the statute, under this indictment, the form it's in, that you will be [fol. 9] limited in this trial, the trial will be limited to the wording of the statute and not the question of advocacy of overthrow.

[fol. 10] Mr. Gladstein: Now, ladies and gentlemen, there will be evidence offered by the prosecution concerning the nature of this union, how it operates, what its Executive Board consists of, what it does. I do not propose now to say any more than this by way of summary. We expect that the evidence will show that Mr. Brown was elected by that union, by the membership, with full knowledge of his reputation of being a Communist Party member, with no concealment or fraud or subterfuge being practiced by any-

one. That the electoral process is just about as fair and honest as it's possible for it to be, and that as a result he was elected to a position on the Executive Board. We will then, by evidence, establish just what this Executive [fol. 11] Board does, what its purposes are, for the purpose of demonstrating to you that Mr. Brown could not possibly have misused or abused his position—

Mr. Poole: If the Court please, again I am going to be forced to interrupt counsel.

The Court: That's right.

Mr. Poole: I assume it is necessary to do this when I feel that the offer is going beyond the scope of the issues in the case, and I believe here again there is not any issue of whether Mr. Brown did misuse or attempt to misuse the power of the Executive—

Mr. Gladstein: Oh, I think, Your Honor, perhaps there is a question of law that ought to be resolved, because if I am inviting interruptions when I turn to the most essential factor in any criminal case, the state of mind and the intention of the defendant—

The Court: Well, no, I believe that Mr. Poole's statement here is correct. I do not think that the issue of what the powers may have been as a member of this Executive Board. . . . As I understand it, once the Government puts its evidence in, we will then be in a position to know—I assume we will then be in a position to know whether or not the essential work of the Executive Board—what its work is and what its powers are. That is all we need to know.

[fol. 12] Mr. Gladstein: Well, we will offer evidence, and if this evidence is received, ladies and gentlemen, it will be for the purpose of proving to you that there was a very specific intention on the part of Congress in adopting this law, and we will offer evidence subject to objection and the ruling of the Court intended to support our theory of the defense, which is that the mere holding of membership in the Communist Party and the mere holding of an office or performing service on the Executive Board of this union would not, in and of themselves, constitute a violation of this law at all, or any law. And that this—

Mr. Poole: Your Honor, excuse me, Mr. Gladstein. Perhaps I am doing counsel a disservice at this time by interrupting at this point but I believe the fair intendment of his statement is that the issues are not confined to the know-[fols. 13-15] ing, obviously, and wilful membership in the Executive Board and in the Communist Party. I believe that the fair inference from Mr. Gladstein's statement is that something more than that is required in order to make out the elements of the offense, which I believe the Court has ruled upon before, and I must therefore object to this suggestion again.

The Court: That's right, Mr. Poole.

[fol. 16] ROBERT ROHATCH, called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your full name, your occupation and your address to the Court and the jury.

The Witness: My name is Robert Rohatch, I am the Secretary-Treasurer of Local 10, ILWU.

Direct examination.

By Mr. Poole:

Q. Mr. Rohatch, I believe you have stated that you are the Secretary-Treasurer of the ILWU Local 10?

A. That's correct, sir.

Q. That is the International Longshoremen & Warehousemen's Union, isn't that correct, sir?

A. That is correct.

Q. That is a labor organization?

A. Yes, sir.

[fol. 17] Q. And it is a local of the international labor organization or union, is that correct, sir?

A. Yes, sir.

Q. Is there a constitution for the International union which prescribes the constituency or the makeup of the locals which form a part of the international?

A. Yes, sir.

Q. Now, you were requested by subpoena to bring with you to court certain records and documents, were you not?

A. Yes, sir.

Q. Have you brought them?

A. Mr. Gladstein has them.

Mr. Poole: May I have them?

Mr. Gladstein: They are in the possession of the clerk.

Mr. Poole: Thank you.

Q. Mr. Rohatch, your function is that of Secretary-Treasurer, is that right, sir?

A. Yes, sir.

Q. And in that connection are you the official custodian of the records and documents of your local?

A. Yes, sir.

Q. Does that custodianship include custody of the official minutes of the meeting. . . .

Mr. Poole: Withdraw that, if I may, please, Your Honor.
The Court: Yes.

[fol. 18]

OFFERS IN EVIDENCE

Mr. Poole: If it please the Court, I would like to have marked first as an exhibit a document entitled Constitution of the International Longshoremen & Warehousemen's Union.

The Court: It may be marked.

The Clerk: Government's Exhibit 1 admitted and filed in evidence.

(Constitution of ILWU was received in evidence as Plaintiff's Exhibit No. 1.)

Mr. Poole: Q. Mr. Witness, I will show you this document that's been marked Government's Exhibit No. 1. I will ask you if you will identify that for us.

A. Article 7, you mean?

Q. No, I am sorry: I didn't open it to any particular place. Just the document itself.

A. Yes, sir, that's correct.

Q. This is the constitution of the International, is that correct?

A. International Union, yes, sir.

Q. And pursuant to the constitution, there is an executive board of your local, is that right, sir?

A. That's right.

[fol. 19] Q. And is there also a constitution for Local 10?

A. Yes, sir.

Q. This was one, then, which was adopted by the members of Local 10 for its—

A. Solely, yes, Local 10 solely.

Q. —own government. This is a part of the record here, too, is it not, Mr. Rohatch?

A. Yes, each local has their own constitution that governs autonomously for that particular local.

[fol. 20] Mr. Poole: Yes. May I have, it the Court please, this marked as Government's Exhibit No. 2, a bound document.

The Clerk: Government's Exhibit 2 admitted and filed in evidence.

(Constitution of Local 10, ILWU, was received in evidence as Plaintiff's Exhibit 2.)

Mr. Poole: Q. Mr. Rohatch, I will show you Government's Exhibit No. 2 and ask if you will identify that for us.

A. That's the constitution for Local 10, ILWU.

Q. Thank you. I call your attention to Article 4, of this same document which you have just identified entitled "Officers, Committeemen and Dispatchers." This is the article providing for the establishment of the Executive Board of the Union, is that correct, sir?

A. Yes, that's in Article 4, Section 7.

Q. Yes.

A. Yes, Section 7 is correct.

[fol. 21] Mr. Poole: Q. The question, I believe, Mr. Rohatch, was, what is the function of the Executive Board of Local 10 of ILWU?

A. The function of the Executive Board is, they usually handle all the affairs, prior to going to the membership. They make certain recommendations to the membership.

They are not a final say; they just make recommendations. You know what I mean.

Q. They carry on the business of the union subject to the membership's approval, is that correct, sir?

A. Approval, right.

Q. Now, as one of the officers designated in the constitution, you were elected to this position and you therefore have custody of these documents which I have shown to you; is that right, sir?

[fol. 22] A. Yes, sir.

Q. Do you also have custody of the minutes of the meetings of the Executive Board?

A. Yes, sir.

Q. And do you have custody of the records of the union showing the election of members to positions, to offices, to committees, to the Executive Board, and the like?

A. Yes, sir.

Mr. Poole: If it please the Court, may I now have marked for identification the following documents. One is a document entitled "Primary Election Results, ILWU, Local 10."

[fol. 23] Mr. Poole: I am offering these documents which will show the election of the defendant to the Executive Board of the ILWU, Local 10, for the years 1959, 1960 and 1961, and also showing the election of the defendant Archie Brown to what is known as the Publicity Committee of ILWU Local 10, which I represent to the Court, in the latter part, will be connected up with other evidence in the case.

[fol. 24] The Court: No, Mr. Poole said that he would have [fol. 25] to connect that portion up. Subject to that offer, they will be admitted into evidence.

[fol. 26] Mr. Poole: If it please the Court, I will offer these documents as indicated. One series of documents will be the election results dated November 13, 14 and 15, 1958.

Mr. Gladstein: Will that be received as No. 3?

Mr. Poole: That will be No. 3, I believe.

The Court: Received in evidence.

The Clerk: No. 3 admitted and filed in evidence.

(Election results of November 13, 14 and 15, 1958, were received in evidence as Plaintiff's Exhibit No. 3.)

Mr. Poole: The next would be a series of documents loosely bound together, entitled "Final Election Results, ILWU, Local 10, November 27, 28 and 30, 1959."

The Court: They may be admitted in evidence.

The Clerk: Government's 4 admitted and filed in evidence.

(Final Election Results, ILWU, Local 10, November 27, 28 and 30, 1959, were received in evidence as Plaintiff's Exhibit 4.)

Mr. Poole: And the third would be a series of documents loosely bound, entitled "Primary Election Results, ILWU, Local 10, November 17, 18 and 19, 1960".

The Court: They may be admitted.

The Clerk: No. 5 admitted and filed in evidence.

[fols. 27-28] (Primary Election Results, ILWU, Local 10, November 17, 18 and 19, 1960, were received in evidence as Plaintiff's Exhibit 5.)

Mr. Poole: Q. Mr. Rohatch, I would like to show you these documents, Government's Exhibits 3, 4 and 5, and I will ask you if they are not the official records of ILWU, Local 10, showing the election of members to the various boards and committees of the union.

A. These are the official copies.

Q. Now, Mr. Rohatch, you know the defendant, Archie Brown?

A. Yes, yes.

Q. And I will ask you if, according to the records, and your knowledge of the union, if during the year of 1959, the year 1960 and the year 1961, Mr. Brown was among those elected to the Executive Board of ILWU, Local 10?

A. Yes, sir.

Q. And in that capacity he served as a member of that board during those years?

A. Yes, sir.

Q. Is there a committee in the union known as a Publicity Committee?

A. There is. There is three members on that.

Q. And during the years of 1959, 1960 and 1961, was Mr. Archie Brown elected to serve as a member of that committee?

[fol. 29] Mr. Poole: The clerk calls my attention, Mr. Rohatch, that there is a pending question which hasn't been answered, and that was, will you tell us whether or not for the years 1959, 1960 and 1961, the defendant Archie Brown was elected to serve on the Publicity Committee?

The Witness: That's correct.

Mr. Poole: Q. Is one of the functions of this committee the publication of—I will withdraw that question, if I may, please.

Does ILWU, Local 10, produce a bulletin for the information of its members, entitled "ILWU, Local 10, Longshore Bulletin"?

A. Well, our weekly bulletin is the Longshore Local 10 Bulletin. That is put out every week.

Mr. Poole: May I mark this as the exhibit next in [fol. 30] order?

The Clerk: Government's Exhibit 6 for identification.

(Copy of ILWU, Local 10, Longshore Bulletin was marked Plaintiff's Exhibit 6 for identification.)

Mr. Poole: Q. Mr. Rohatch, let me show you Government's Exhibit No. 6. Is that one of the copies of the bulletin which is published by the union?

A. Yes, that's one.

Q. And was it one of the duties of Mr. Brown as a member of the Publicity Committee to put out this bulletin, this sheet?

A. That's correct.

Q. Particularly the one which you identified is dated February 12, 1960, and on the back of it there appears at the very end the name "Archie Brown, Publicity Committee; AWOEIU--29, AFL-CIO."

This refers to Mr. Archie Brown, does it?

A. The usual practice, Mr. Poole, is that each week we have three editors. He was the editor—the writer, shall we say.

Q. He was the writer of this particular issue of the bulletin?

A. That's right.

.

[fol. 31] (Copy of ILWU, Local 10, Longshore Bulletin, heretofore marked for identification, was received in evidence as Plaintiff's Exhibit No. 6.)

.

Mr. Poole: Q. Mr. Rohatch, I will show you a group of documents which is marked Government's Exhibit No. 7 for identification. Do you know what they are?

A. These are meetings of the regular Executive Board, and here is one of the special Executive Board.

Q. They are minutes of the meetings of the regular or [fol. 32] special Executive Board, are they not?

A. Of Local 10.

Q. You brought them pursuant to subpoena, did you not, sir?

A. Yes, sir.

Q. And these are part of the documents that are in your custody as Secretary-Treasurer?

A. They are the permanent records of the union.

Q. These are official records of the union?

A. Yes, sir.

Q. And which are kept as permanent records?

A. Yes, sir.

Q. Now, Mr. Rohatch, will you by examination of one of these documents, which I do not particularly designate, but there appears uniformly at the top of these minutes, at the beginning, what is called "roll call." Will you tell us what the significance, if any, is of that?

A. Well, the roll call is the members that are present at this particular Executive Board meeting.

Q. And then down below on the page there appear the letters, frequently in caps, large caps—"M", with a slash,

and then "S". Does that mean that a motion of some sort was made—moved and seconded?

A. MSC, you mean?

Q. Yes.

A. Yes, sir, that's correct.

[fol. 33] Q. And then the names that appear in connection with the various motions made or carried or lost are the names of the persons of the Executive Board who participated in that parliamentary discussion; is that correct, sir?

A. Yes, sir.

Q. Was there during this period of time any other Archie Brown or any other Brown on the Executive Board other than the defendant Archie Brown?

A. No, there is only one Archie Brown.

Q. And then where in the minutes there is a reference to deliberations conducted at a board meeting which refer only to "Brown" rather than the full name, may we understand that to mean and refer to Archie Brown unless there is otherwise some identification?

A. Well, he is the only Brown I ever knew that served on the Board, so naturally it must be Archie.

Q. Now, Mr. Rohatch, these minutes purport to show the persons who were present at the meetings, regular and special, of the Executive Board of ILWU; is that right, sir?

A. That's correct.

Q. And pursuant to the subpoena you brought the minutes which show the meetings of the Executive Board, commencing with a meeting of October 21, 1959 and concluding with a meeting on February 23, 1961; is that right, sir?

A. That's according to what you asked for.

[fol. 34] Q. It covers October 21, 1959 to May 11, 1961?

A. That's correct.

Q. And during this entire period of time Mr. Brown was present at the Executive Board meetings; is that right, Mr. Rohatch?

A. Well, if the record shows that he was present, yes, he was there.

Q. I do not mean to imply that he was present at every meeting.

A. Oh, no, no.

Q. But that the minutes do reflect his presence at meetings during this period of time?

A. Yes, sir.

Q. And they also reflect much of his participation in the business of the union conducted at the meetings; is that correct, sir?

A. Yes.

Q. Will you answer this for me, Mr. Rohatch: I noted on examination of these minutes that often where a motion is made and is voted upon by the Executive Board, that there [fol. 35] appears a notation that some member of the Executive Board is recorded as voting against.

A. That's correct.

Q. Is it correct that if there is no notation that a member of the Executive Board present voted against, that he is deemed to have voted in favor of the motion?

A. No, not necessarily. Actually, the action is governed by the majority of the Board, and sometimes some controversial question comes about and someone feels very strongly, then they will note in the minutes. For the record, they will be recorded voting "no".

Q. I see. It doesn't mean that he voted one way or the other simply because the notation is not there?

A. That's right; the majority rules.

Q. Just before I offer these, Mr. Rohatch, I would like to call to your attention that on the first meeting which purports to be October 21, 1959, Mr. Brown is recorded as being present; is that correct, sir?

A. That's correct.

Q. And on the last meeting which purports to be that for the meeting of May 11, 1961, Mr. Brown is likewise reported as being present?

A. Yes, sir.

Q. His presence at these meetings was in his capacity as a member of the Executive Board?

[fol. 36] A. Yes, sir.

(Minutes of Executive Board meetings 10/21/59. to 5/11/61 heretofore marked for identification, were received in evidence as Plaintiff's Exhibit No. 7.)

[fol. 37] (Thereupon, the jury retired from the courtroom and the following proceedings were had outside the presence of the jury.)

The Court: Mr. Gladstein, this memo you handed up early in the case during the discussion, entitled "The Defense Theory of the Case"—you asked that it be marked by the clerk. I thought it might be just as well—

Mr. Poole, you have a copy of it?

Mr. Poole: Yes, we do.

The Court:—rather than mark it in evidence—I have read it—that it be deemed read and copied in the record by the reporter.

[fol. 38] "THE DEFENSE THEORY OF THE CASE

"On its face, the statute is unconstitutional as an infringement of First Amendment rights; a flagrant interference with the free election procedures in a trade union, and a taint upon individuals.

"The indictment being in the language of the statute, it too is fatally defective.

"To save the indictment, it would be necessary for the Court to instruct the jury in the manner employed by the Supreme Court in *Scales* case, under the Smith Act, and on the strength of the reasoning enunciated in the *Douds* case, to the following effect: That the congressional power employed is that which in the Constitution authorizes the Congress to make laws regulating foreign and interstate commerce; that in adopting this law the legislative history shows that the Congress was concerned with the possibility that politically motivated strikes might be called having as their object not some bona fide economic purpose, but rather the mere objective of disrupting and paralyzing interstate commerce (for reasons of a political nature),

and the statute was designed to provide a means of carrying out that congressional purpose.

"However, this being a criminal case, with imprisonment and fine as the penalty for a violation of law, no [fol. 39] individual can be lawfully convicted unless within the purview of ordinary standards of criminal law the defendant possessed the intent to bring about the evil against which the Congress was seeking to legislate, and unless also his conduct was such as to create a union of criminal act and criminal intent in accordance with the strict requirements of criminal law. Without such, there would be a taking of liberty without due process of law.

"From all of the foregoing it follows that the defendant in a given case cannot be found guilty unless the evidence proves beyond a reasonable doubt each and every one of the following facts:

"1. Not only that he served as a member of an Executive Board, but that he did so with the specific intent that his services thereon should bring about an interference with or disruption of interstate commerce (for political considerations).

"2. Not that at times or places other than during Executive Board meetings he expressed himself in a manner exhibiting an intent to bring about a forbidden result, but that within the confines of the Executive Board meetings themselves; while he was in actuality serving as an Executive Board member (or in such other places and at such times served as an Executive Board member) he so conducted himself and so spoke as to reflect an intention to bring about a prohibited result.

[fols. 40-41] "3. Not only that he did the above, but also that his words and conduct while serving as an Executive Board member were reasonably designed to cause, create or contribute to the creation of a disruption of commerce by the Union.

"4. Not only that the Board was known as an Executive Board but that in fact it possessed the power to adopt a plan of action that would directly create a disruption of interstate commerce.

"5. That he concealed from his colleagues in the Union what his true intent, purposes or affiliations were, so as

to deceive them into not being aware that he entertained a criminal purpose and was acting with the deliberate intention to cause a disruption of interstate commerce."

[fol. 42] Mr. Poole: Q. Mr. Brown, I have here photostatic copies of the minutes which you have identified—

A. Mr. Rohatch. I am sorry.

[fol. 43] Q. I beg your pardon.

The Court: Mr. Rohatch.

Mr. Poole: My mistake, Your Honor.

Q. And I am going to ask you to hold these, and I am going to check these with you for the benefit of the ladies and gentlemen of the jury.

First, you have the minutes of October 21, 1959?

A. Yes, sir.

Q. At that meeting Mr. Archie Brown is recorded as being present, is that correct?

A. That's correct.

Q. And at that meeting, according to the minutes, was there a discussion in the Executive Board concerning a letter of Mr. Louie Goldblatt, referring to certain correspondence which took place between Secretary of Labor Mitchell and the attorneys for ILWU, Local 10?

A. Can't seem to find it here.

Q. Yes, there is the motion, right there. Right below "discussed." It reads:

"Letter dated October 20th of Louie Goldblatt, International Secretary-Treasurer, regarding the tentative Landrum-Griffin bill, copy attached to these minutes." [fols. 44-46] utes."

Correct sir.

A. Yes, sir.

Q. And there was a letter or several letters which were referred to and discussed at that meeting, according to the minutes. That letter is attached to that copy of the minutes, is that right, Mr. Rohatch?

A. Yes, sir.

Q. Particularly may I refer you to the attachment to the minutes, which purports to be, or is, a copy of a teletype from James P. Mitchell, Secretary of Labor, reading as follows:—

[fol. 47] "Harry Bridges, President, International Longshoremen's and Warehousemen's Union, 150 Golden Gate, S. F." It comes from Washington, D. C., it is dated 10/1/59.

"Your attention is called to Section 504 of the Labor Management Reporting and Disclosure Act of 1959, which has been in effect since Monday, September 14th. This section of the Act makes it a criminal offense punishable by fine or imprisonment or both:

(1) For any person to willfully serve as an officer of employee, except in clerical or custodial positions, in a labor organization or in an employer association which deals with labor organizations or as a labor [fol. 48] relations consultant within five years of:

- (a) Membership in the Communist Party,
- (b) Conviction or imprisonment for robbery, bribery, extortion, embezzlement, grand larceny, burglary or arson, violation of the narcotics law, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or conspiracy to commit such crimes.
- (c) Conviction or imprisonment for violation or conspiracy to violate the reporting or trusteeship provisions of this Act; or

(2) For any labor organization or officer thereof, knowingly and willfully to permit any person to assume or hold any office or paid position contrary to the above prohibition, unless the person holding the office or position having been convicted or imprisoned has, within such five-year period, either

- (a) Had his citizenship rights fully restored after their revocation because of such conviction, or

(b) Had a determination by the Board of Parole of the United States Department of Justice that his service in any such capacity would not be contrary to the purposes of the Act.

This is to request that you advise me within ten days [fol. 49] whether any person serving in your organization in capacities referred to in Section 504 have, within the past five years, held membership in the Communist Party or had a conviction or served any term of imprisonment for any crime specified in that section, and if the answer is yes, please furnish a written list of such persons and advise me what action your organization is taking regarding these individuals.

James B. Mitchell, Secretary of Labor."

Q. That is the document which was received at that meeting, is that correct, Mr. Rohatch?

A. That's correct.

Q. And there also is an attachment to the minutes, a letter dated October 9, 1959, the letterhead of Gladstein, Andersen, Leonard and Sibbett, 240 Montgomery Street, San Francisco 4, directed to Honorable James P. Mitchell, Secretary of Labor, Washington, D. C.

"Dear Mr. Secretary:

"Your telegram of October 1, 1959, addressed to Harry R. Bridges, President, International Longshoremen's and Warehousemen's Union, has been directed to this office, as the attorneys for the International Union.

"In your telegram you request Mr. Bridges to advise you whether any person serving in the organization as [fol. 50] officers or employees, except in a clerical or custodial position, have, within the past five years, held membership in the Communist Party or had a conviction or served any time of imprisonment for a long list of specified crimes. Your request refers to Section 504 of the Labor Management Reporting and Disclosure Act of 1959.

"(1) In our judgment, and we have so advised Mr. Bridges, Section 504 is unconstitutional, since it violates the provisions of at least the First and Fifth Amendments to the Constitution of the United States. Among other cases which could be cited, we should like to call your attention to *American Communications Association vs. Doud*, (with a citation), *Wyman v. Updegraff* (with a citation), and *Yates v. United States* (with a citation).

"(2) We are unable to find anything in Section 504, and we have so advised Mr. Bridges, which gives you the authority to make the request you have made or which requires him to respond thereto.

"(3) Nor are we able to find anything in Section 504, and we have so advised Mr. Bridges, which imposes upon him any affirmative duty to undertake the various investigations which might be necessary in order to [fol. 51] obtain the information to which your telegram refers.

"(4) As we read it, this too we have told Mr. Bridges, Section 504 is so vague and indefinite as to be meaningless.

- (a) We are unable to advise our client with any degree of certainty whether the organization referred to in your telegram means the International Union of which he is the president or whether it means all of its locals, each of which has complete autonomy concerning the election and recall of its officers and the hiring and firing of its employees, nor can we tell with any certainty which employees fall within and which without categories of clerical or custodial. We do not understand that the law calls upon our client to make such a determination at his peril.
- (b) The law does not specify the facts which must be determined before the status of membership in the Communist Party is established, nor does it state who is to make the determination. Is Mr. Bridges expected to do so or is he to wait until a court or some governmental agency has first acted? To which Communist Party does

- [fol. 52] the Act refer? The Stalinists? The Trotskyists? The Workers' Party? Or what?
- (c) Are you requesting Mr. Bridges to examine the criminal court records throughout the United States so that he may advise you of the status of an indeterminate number of officers and employees? We do not believe that the law calls upon Mr. Bridges to undertake any such burdensome and oppressive inquisition, for which there are no standards of guidance or evaluation, and we have so advised him.

"We cannot lightly assume that the Supreme Court will sustain a law so vague, uncertain and indefinite. Among other cases which could be cited, we should like to call your attention at least to *International Harvesters Company vs. Kentucky* (citation), *United States vs. Cohen Grocery Company* (citation), *Lanzetta vs. New Jersey* (citation), and *Winters vs. New York* (citation). For each and all of the foregoing reasons, our client must respectfully decline to comply with your request.

Very truly yours, Gladstein, Andersen, Leonard & Sibbett."

[fol. 53] And then there appears also an attachment, a letter dated October 20, 1959, to all ILWU locals, and this is on the letterhead of the International Longshoremen's and Warehousemen's Union, 150 Golden Gate Avenue, San Francisco 2, California, and it reads:

"Dear Sirs and Brothers:

"Enclosed are two documents of vital importance and interest to the members of ILWU: one a telegram dated October 1, 1959, addressed to President Bridges by Secretary of Labor Mitchell, requesting that certain information be forwarded to his office in accordance with Section 504 of the Labor Management and Disclosure Act of 1959, Kennedy-Landrum-Griffin Bill; two, a reply to Secretary of Labor Mitchell by the International's attorneys. We have been further advised by our attorneys that the Department of Labor

or representatives of other federal agencies may make inquiries of local unions. It is their advice that in the event any communications are received by the locals from the Secretary of Labor or his agents, or in the event any personal inquiries or interrogations are made of any officials of any local union, he should (a) immediately consult counsel before responding to any inquiries, (b) should forward copies of all inquiries to the International for liaison purposes. The Inter-[fol. 54] national Union, in conjunction with other unions and our attorneys, is making a careful study of the entire action and will in the near future forward detailed information to all locals as well as arrange for regional conferences for full and complete discussion of the Act.

"Fraternally, Louis Goldblatt, Secretary-Treasurer."

Q. Mr. Rohatch, all this correspondence was presented to that meeting and it formed the subject of discussion on that particular meeting, is that correct, sir?

A. Yes, sir, part of the attachments to October 21, 1959.

Q. Yes, sir. Mr. Louis Goldblatt is the Secretary-Treasurer of the International, is that correct?

A. The International Union, yes, sir.

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[fol. 55] Mr. Poole: Q. The minutes of the next meeting which I wish to call your attention to, Mr. Rohatch, are minutes of the meeting of October 29, 1959. Do you find them there?

A. Yes, sir.

Q. These are not exactly in the order in which I last left them, so I have to find them. Oh, here they are.

And at that meeting, according to the record here, Mr. Archie Brown was present, is that correct, sir?

A. Yes, sir.

Q. And if I may call to your attention—perhaps it might serve an equal purpose—apparently this was a special Executive Board meeting, is that correct, sir?

A. This was a special meeting. To outline the purpose

of the meeting, it was to acquaint the members of the various committees with the new law.

Q. The new law that is meant here is the Landrum-Griffin Act?

A. Yes, sir.

Q. And this meeting refers to the president; is that Callahan?

[fol. 56] A. Callahan, Martin Callahan.

Q. Martin Callahan?

A. Yes.

Q. And he was at that time the president of the local?

A. Yes, sir.

Q. "President Callahan outlined the purpose of the meeting, which was to acquaint the members and the various committees with the provisions of the new law. President Callahan called on Norman Leonard, one of our union attorneys, to outline the legal aspects of the law."

Mr. Rohatch, the Norman Leonard is Mr. Leonard, who is sitting at counsel table behind me, is that correct, sir?

A. Yes, sir.

Mr. Leonard: I gave him legal advice at that meeting, Mr. Poole.

Mr. Poole: You are anticipating the next paragraph.

"He gave a very informative and detailed report on how the application and provisions of the new law will probably affect labor unions. He said in part that it was definitely a setback for labor and that it would pose problems in the legal profession which would require months of study. President Callahan then called on International President Harry Bridges, who explained what our union approach would be to the [fol. 57] new bill. He said that the answer was a simple one—business in the same old way and in the same old fashion with the full understanding by the rank and file. We will deal with this new law just as we have dealt with others in the past. President Callahan then called on George Andersen, union attorney, who stated that this new law is five times as bad as the Taft-Hartley Act and he cited the Mine, Mill and Smelter Workers' Union, the Marine Cooks and Stewards, and other unions, as an example, and pointed out that \$5

million was spent in trying to wreck them. A long discussion followed, many questions were answered by International President Bridges and the attorneys, which gave the members a better understanding of the new law. President Callahan then thanked the attorneys and International President Bridges for their report."

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[fol. 58] Mr. Poole: Q. I call next to your attention the meeting of January 14, 1960. The minutes reflect that Mr. Brown was present at that time, is that correct, Mr. Ro-hatch?

A. Yes, sir.

Q. And you will note on page 2 that there appear to be two places, one just below the middle of the page, and one [fol. 59] just above the middle of the page, and, oh—one just below the middle of the page. There purport to be motions made by the defendant Archie Brown in this particular instance to close debate on certain discussion.

A. To close debate on two questions, yes, sir.

.

Q. May I call to your attention next the meeting of January 28, 1960?

A. Yes, sir.

Q. The minutes of that meeting reflect that Mr. Archie Brown was present; correct, sir?

A. Yes, sir.

Q. And I call to your attention page 5 of the minutes. I believe it is page I think I have a typographical error here, and I believe instead of its being page 5—

A. Page 3, I believe it is.

Q. Yes, it should be page 3. Thank you. Mr. Brown made a motion in the course of the meeting?

A. Yes, sir.

Q. May I next call your attention to the minutes of [fol. 60] February 25, 1960, and on page 1, the first page of those minutes, approximately the middle of the page, there is a motion, apparently, made by Mr. Brown, and on page 2 there is a second motion, apparently, made by Mr. Brown, each of which relates to certain of the union's conduct of the affairs of its business?

A. Yes, sir, 1 and 2, that's correct.

Mr. Gladstein: Are those the January 20th minutes you are talking about?

Mr. Poole: Sir?

Mr. Gladstein: That wa. January—

The Witness: February.

Mr. Poole: February 25, 1960.

Q. I next call to your attention what appears to be a special Executive Board meeting on March 3rd, 1960, where the minutes show that Mr. Brown was present.

A. Well, it doesn't show he is present at the top, but it does say there is a motion made by him.

Q. The roll call is missing from this one?

A. Yes.

Q. But it does show a motion made by Brown, and this is a meeting—and he was the only one on the Board by the name of Brown, I believe you told us?

A. Actually the roll call is on the second page there at the end of the minutes.

[fol. 61] Q. Yes, at the end of it this time?

A. Yes.

Q. All right. May I next call to your attention the minutes for the meeting of March 24, 1960, where the roll call shows Mr. Brown. . . . Oh. The roll call does not show Mr. Brown.

A. The 24th, it is?

Q. Yes; shows Mr. Brown present.

[fol. 62] There appears to be a motion on the first page—I believe that is on page 3, Mr. Rohatch. Will you look on page 3?

A. I don't see his name there, though. Kearny and Osborne—

Q. Where it says "Amendment: That we designate Brother Brown and Brother Osborne" I think it is—

A. As delegates, yes.

Q. As delegates to attend the meeting of March 26, 1960.

A. Yes, sir.

Q. May I next call your attention to the meeting of April 14, 1960. The rollcall doesn't show the presence of Mr. Brown at that meeting, but if you will look about five or

six inches down from the top of the page, you will note that there is a statement:

"The minutes of the Political Actions Subcommittee were read. Brother Archie Brown also reported for the Political Actions Subcommittee."

Does that mean that he came in perhaps after the rolleall was taken?

A. Are those in the minutes of April 14th?

Q. April 14, 1960. Do you find them?

A. On the first page?

Q. On the first page. May I point them out to you? Right there (indicating).

[fol. 63] A. Oh, yes.

Q. Mr. Rohatch, the portion I directed your attention to under the word "Minutes" which appears in the large caps—

[fol. 64] Mr. Poole: May I call to your attention the minutes of April 28, 1960. The roll call taken at that time shows Mr. Archie Brown was present; is that correct, Mr. Rohatch?

A. Yes, sir.

Q. I next call to your attention— What a minute; I guess I'm not through with that yet.

May I next call to your attention the minutes of May 12, 1960. The minutes reflect that Mr. Brown was present at that meeting?

A. Yes, sir.

Q. On page 1 it appears that he made a motion relating to instructions to officers.

A. "That the officers be guided by the following." He made a motion, yes.

Q. Yes. I am reading from the summary: "That the [fol. 65] officers be guided by the summary." This relates to some operations on what is called the deck. This has to do with the working activities of the union; is that correct?

A. That's correct.

Q. And on page 2 it appears that Mr. Brown presented a resolution to the Board, copy of which is attached to the minutes of this meeting. Do you find that, sir?

A. Yes, sir, right on the top of the page.

Q. And the resolution, which has what appears to be the signature of Archie Brown, Book 362—is that, to your understanding, Mr. Brown's signature?

A. I believe so; I don't know for sure.

Q. This is a resolution on the Un-American Activities Committee.

Mr. Gladstein: Your Honor, I am going to object to this as not relevant unless it be the theory of the prosecution that any and every document that came before the union meeting was relevant. If that be true, that doesn't make any difference primarily whether Mr. Brown, in serving on the Executive Board, made motions or didn't. Although I have no objection, if we are going to have all of the motions—

The Court: Mr. Poole has explained, I believe, that the purpose was in showing that Mr. Brown attended these meetings; that he was an active member of the Executive Board and took part in the business of the Board. That is [fol. 66] different than just passive and being named and not ever doing anything. That, I understand, is his purpose; is that right?

Mr. Poole: I have read either verbatim or in what I believe is a fair summary every indication in the minutes thus far of Mr. Brown's participation, and it is only those matters that I have read, with the exception of the letter from Mr. Gladstein's office and the telegram from Secretary Mitchell.

Mr. Gladstein: I will make the objection that this is incompetent, irrelevant and immaterial.

The Court: All right. Overruled.

Mr. Poole: This document purports to read:

"Whereas: Countless organizations and individuals, such as the S.F. Central Labor Council, the California Democratic Clubs, the Diocese of the Episcopalian Church, professors, students and many others have gone on record demanding that the Un-American Committee call of"—"call off its current hearings and, furthermore, urging the abolition of the Committee

altogether, despite this command the Committee has brazenly gone ahead with its witch hunt and harassment of good citizens, and

Whereas: the committee hearings on Thursday, May 12th were marked with the most undemocratic conduct by the Committee, who passed out entrance cards to their friends and thereby barred some 2,000 interested [fol. 67] citizens from the hearings and coldly rejected any demand for obtaining a larger hall or letting in enough people to actually fill the hall, and—

“Whereas: the most disgraceful conduct was displayed by the Un-American Committee and the S. F. Police Department who did its bidding. People were bodily thrown out of the hearing when they demanded that the people be let in. One woman was so mistreated that she suffered a heart attack and has been hospitalized and others had their clothes torn and generally mistreated, and

“Whereas: we view the present Chairman of the Committee as holding his seat illegally. Edward E. Willis from the Third District in Louisiana was elected with but 8,962 votes in a population of over 200,000. The negro people in that district were barred from voting. Therefore, be it

“Resolved: That we condemn the undemocratic action of the Committee in closing the hearing to most people not their friends, and again call for the abolition of the Committee and be it further

“Resolved: We condemn the action of the San Francisco Police Department for acting as a goon squad for this notoriously anti-labor, anti-negro, committee and we demand that the Board of Supervisors shall [fol. 68] immediately hold a hearing on this matter and take action to prevent such atrocities in the future.”

Mr. Gladstein: If Your Honor please, I make a motion that the Court declare a mistrial on the ground that the prosecution has introduced matters completely extraneous to the issues in this case. While I personally don't disagree with a word that was said in there, neither did, apparently, the Union, it is not something that belongs in a court of justice. I think counsel knew in advance what

he was doing and I ask that the Court strike from the record what was just read and declare a mistrial.

Mr. Poole: I see nothing improper in that, Your Honor. I am simply referring to matters of Mr. Brown's activity in his capacity as a member of the Executive Board of ILWU, Local 10.

The Court: I will deny the motion.

Mr. Gladstein: I made two motions, Your Honor.

The Court: What was the other?

Mr. Gladstein: One was to strike this from the record; the other was to declare a mistrial.

The Court: Both are denied.

Mr. Poole: May I next call your attention, Mr. Rohatch, to the minutes for the meeting of May 26, 1960. The roll call shows that Mr. Archie Brown was present at that meeting?

A. Yes, sir.

[fol. 69] Q. And on page 2 of the minutes there is apparently a motion by Brown that "We instruct the Labor Relations Committee to take up the question of the registration of six Hawaiian brothers who are working on the floor here." That had something to do with some members of your union from Hawaii; is that correct?

A. Yes, sir.

Q. May I call your attention next to the minutes for the meeting of June 9, 1960. The roll call shows that Mr. Archie Brown was present?

A. Yes, sir.

.

Q. Do you find the minutes of July 28, 1960?

A. Yes, sir.

Q. And the roll call shows Mr. Brown present at that time?

[fol. 70] A. That's correct, sir.

Q. The minutes of August 11, 1960.

A. Yes, sir, he is present.

Q. The roll call shows him present there. The minutes of August 25, 1960.

A. Yes, sir, he is present there on the roll call.

Q. Now may I call to your attention that on page 2 of the

minutes there is a motion by Mr. Brown that the Executive Board members help circulate petitions and certain information be published in The Bulletin. Do you find that there, sir, towards the bottom?

A. Yes, sir, that is correct, near the bottom.

Q. And on page 3 a motion by Mr. Brown just below the middle of the page that the Union request one of its members to relinquish his position as gang boss. Do you find that, sir?

A. Yes, sir.

Q. It is in large caps.

A. Yes.

Q. I call to your attention the minutes of the meeting of September 15th— Just a moment; excuse me—September 8, 1960.

A. Yes, sir.

Q. The roll call shows Mr. Brown present at that time?

A. Yes, sir.

[fols. 71-72] Q. And directing your attention to page 3, just about the middle of the page, a little bit below, there is a motion by Mr. Brown to "Instruct our delegates to the forthcoming caucus to re-open the question of leaving free transfers from the B list to the A list."

A. Yes, sir, that's in there.

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[fol. 73] Direct Examination (resumed)

By Mr. Poole:

Q. Mr. Rohatch, may I call your attention to the minutes of the meeting of the Executive Board of September 15, 1960?

A. Yes, sir.

Q. The roll call on the third column reflects that Mr. Brown was present at that meeting?

A. The record shows him the second from the top, that's correct.

Q. Where, sir?

A. Second from the top on the third row.

Q. Yes. Yes, thank you.

Now this was a special Executive Board meeting, it says

here, "Minutes of special Executive Board meeting and all standing committees?"

A. That's right.

Q. On the first page—oh, yes, just about midway—on a motion to approve the minutes of the meeting, the special meeting of August 31-September 1, 1960, held by the officers and Board of Trustees, there is an amendment and motion [fol. 74] to amend by Mr. Brown to the effect that the particular recommendations embraced therein be discussed seriatim. Do you see that, sir?

A. Yes, sir.

Q. And on page 2 an inch or two below the middle of the page there is a motion by Mr. Brown that recommendations made by officers and the Board of Trustees be adopted?

A. About the middle of the page, yes.

Q. About the middle of the page. Thank you, sir.

May I call to your attention the minutes of the meeting of September 22, 1960, the roll call reflecting that Mr. Brown was present at that meeting?

A. That's right, sir.

Q. May I call to your attention the minutes of the meeting of October 13, 1960. The roll call reflects that Mr. Brown was present at that meeting?

A. Correct. That's correct, sir.

Q. And about the middle of the page there is a motion by Brown that the sub-committee be guided by the quota set down by the Executive Board in membership, all others are to work off the floor when granted full work privileges?

A. That's right. There is a motion made by Brother Brown.

Q. Yes, sir. There is also on the same page, at the bottom, motion by Mr. Brown that the secretary be instructed [fol. 75] to write to the *Coro* Foundation protesting its disqualification of Miss Jane O'Grady as an intern. Letters should be sent informing the Foundation we are withholding final judgment and action in our relation to the Foundation until we receive an explanation from them. Copy to be sent to the president, AFL.

A. That's the bottom of the page.

Q. The very bottom of the page, yes, sir.

On page 2 of the minutes of that meeting, three or four

lines down from the top, there is a motion by Mr. Brown that Local 10 should adopt the District Council resolution on the K-9 Corps proposed by Chief of Police Cahill. This resolution shall be read to the membership at the next meeting and printed in The Bulletin.

A. That's also there.

Q. Yes. Now may I call to your attention the minutes of the meeting of October 27, 1960. The roll call reflects that Mr. Brown was present, is that correct, sir?

A. Yes, sir, that's correct.

The next meeting is January 26, 1961?

A. Correct.

Q. And the roll call there reflects that Mr. Brown was present, is that correct, sir?

[fol. 76] A. The record shows he was present, yes, sir.

Q. May I next call to your attention the minutes of the meeting of February 9, 1961? Roll Call there reflects that Mr. Brown was present, does it not?

A. Yes, sir, that shows.

Q. And on page 1 there is a motion by Mr. Brown to concur in a resolution to the effect that the members of ILWU, Local 10, believe that the B men should be permitted to complete any job to which they are dispatched?

A. That's correct.

Q. On the same page, lower down, there appears to be another amendment, another motion by Mr. Brown, on the same subject, it appears, to instruct the officers of Local 10 to fight for leaves of absence for the B men with the local labor relations committee, this to apply only between now and May 1st. If this is not successful, then we call upon the Coast Committee to use their good offices to assist the local officers in their efforts to get leaves for the B men.

A. That's the second one from the bottom, sir.

Q. Yes, sir. Page 2, a little below the middle of the page, there is a motion by Mr. Brown that the officers will meet with the Chief Dispatcher and Assistant Chief Dispatcher to discuss problems of the hiring hall and to bring recommendations back to the Executive Board.

A. That is correct.

[fol. 77] Q. On page 3, second item, there is a motion by Mr. Brown that the officers of Local 10, after consulting with the International officers, shall issue a proper statement in relation to Mayor George Christopher's recent blast at the students and in support of the tactics of the Un-American Committee.

A. That is true.

Q. May I next call to your attention the minutes for the meeting of February 23, 1961. The roll call reflects that Mr. Brown was present?

A. The record shows that, yes.

Q. And on page 2, about a third of the way down, there appears to be a motion by Mr. Brown that the members of the Sports Committee and all other interested people, including the band representatives or any other activities, meet with the officers at the earliest possible time.

A. That's correct.

Q. May I next call to your attention the minutes of the meeting of March 9, 1961. The roll call reflects that Mr. Brown was present?

A. The record shows he was present, sir.

Q. And on page 1 there is a motion by Mr. Brown on a resolution to life the freeze on the transfer of limited registered men to the A list, and this to act as instructions to the conference delegates?

[fol. 78] A. That's correct.

Q. The motion was apparently lost and Mr. Brown then is recorded as voting yes on the motion?

A. That's correct.

Q. Prior to the motion to which I directed your attention just then, Mr. Rohatch, it escaped me at that time—there is a motion by Mr. Brown which appears just above the original motion which I direct your attention to, motion by Mr. Brown that we concur with the position of the minority of the Supreme Court, and in particular with the dissenting statement of Hugo L. Black, on the House Un-American Activities Committee, copy of motion attached to original minutes?

A. That's correct.

Q. And the attachment to the minutes referred to reads as follows:

"Resolution on the House Un-American Activities Committee:

"Whereas the ILWU has consistently upheld the Constitution of the United States; and

"Whereas the ILWU has always maintained confidence in the spirit of freedom granted by the Bill of Rights; and

"Whereas we have seen those rights gradually weakened by constant attacks by congressional committees on unions, organizations and individuals who [fol. 79] have availed themselves of these constitutional rights; and

"Whereas the Supreme Court recently, in a bitterly divided five-to-five (sic) decision (upheld a court ruling to imprison militant foes of the House Un-American—" five-to-five decision, that's what it says: ". . . . imprison militant foes of the House Un-American Activities Committee, one a Southern integration leader; and

"Whereas these two men, *Frank Wilkinson* and *Carl Bradon*, are imprisoned because of their use of the Third Amendment of the Bill of Rights in opposition to the inquisition of the HUAC; and

"Whereas at least 45 other individuals stand in danger of imprisonment and countless others have lost their jobs because of their brave stand;

"Therefore, Be It Resolved that the ILWU goes on record showing its concern and shock at the majority stand of the Supreme Court in this instance; and

"Be It Further Resolved that we concur with the position of the minority, and in particular, with the dissenting statement of Hugo L. Black, in which he said:

"It is already past the time when people who recognize and cherish life-giving and life-preserving quality [fol. 80] ties of the freedoms protecting the Bill of Rights can afford to sit complacently by while those freedoms are being destroyed."; and

"Be It Further Resolved that we commend the courageous stand of *Frank Wilkinson*; who, in learning

of the Supreme Court's decision, which meant a year in jail for him, said:

'We will not save free speech if we are not prepared to go to jail in its defense. I am prepared to pay that price.'

"Submitted by Archie Brown, Book 362."

A. Correct.

Q. As an attachment.

May I next call your attention to the minutes of the meeting of March 23, 1961. The roll call reflects that Mr. Brown was present?

A. The record shows it, yes, sir.

Q. May I next call to your attention the minutes of the meeting of April 13, 1961?

A. The record shows he was present, yes, sir.

Q. Shows he was present.

May I next call to your attention the minutes of the meeting of April 27, 1961?

A. The record shows he was present there, too, sir.

Q. May I also direct your attention to page 2 of those [fols. 81-82] minutes, just below the middle of the page? There appears to be a motion to amend a pending motion, made by Mr. Brown, to give special dispensation to the B brothers from Hawaii who were turned down on the B list.

A. About the B list, yes, that's correct.

Q. And apparently down about three inches lower there was a roll call on the vote and Mr. Brown is reported as voting yes?

A. That's correct, sir.

Q. May I call your attention to the minutes of the meeting of May 11, 1961?

A. The record shows he was present, yes, sir.

Q. Thank you. Is that the last one you have, Mr. Rohatch?

A. November 12th?

Q. What's the date?

A. November 12th, 1959 is the next one I have got.

[fol. 83] Mr. Poole: Q. Mr. Rohatch, Article 20 of the International constitution which is Exhibit No. 1 in this matter provides that a newspaper shall be published by the International Union. Is there a provision for the publication of a newspaper by the local?

[fol. 84] A. No, sir.

Q. Is there a newspaper published by the local?

A. The only publication we have as such is the regular weekly Bulletin.

Q. The Bulletin?

A. Yes, sir.

Q. Is there a newspaper published by the International?

A. Yes, there is.

Q. What is the name of it?

A. The Dispatcher—ILWU Dispatcher.

Q. In the Bulletin which, as you have told us, is a publication by the Union, I call to your attention again, sir, Government's No. 6, the Bulletin for the date of February 12, 1960, and particularly page 2 of it. That is the Bulletin?

A. Yes, sir, that's correct, sir.

Mr. Poole: Your Honor, I think there has been reference to this already in the record but I would like to read now the one paragraph from this Bulletin which I believe relates to the matter referred to.

On page 2 of this Bulletin under date of February 12, 1960 the following appears.

"Fresno is the place that the ILWU Northern and Southern Councils got together and worked out an all-out fight against the enemies of labor. You are urged to read your Dispatcher of January 29th for full details [fols. 85-88] tails. Part of the program adopted states: 'We call upon all workers and leaders of labor to formulate a joint policy in the interests of the whole people, a policy which will give strength and meaning to the program for independent political action.'"

(Copy of Dispatcher was marked Plaintiff's Exhibit No. 8 for identification.)

[fol. 89]

OFFER IN EVIDENCE

The Clerk: Government's Exhibit 8 admitted and filed in evidence.

(Thereupon Plaintiff's Exhibit 8 for identification was received in evidence.)

Cross-examination.

By Mr. Gladstein:

Q. Mr. Rohatch, you brought us a copy of the constitution of Local 10, right?

A. Yes, sir.

Q. That was the governing document for the union during the period of this indictment which covers a date in 1959 to a date in '61; right?

A. That's correct, sir.

Q. And it is the place where one finds all the duties, the powers of the various officers and boards and the methods by which they are elected or selected; that's right?

A. That's correct, sir.

Q. Tell us, sir—and sometimes I may lapse in my questioning into the present tense, but you will understand that when I am talking about the union and its operations and activities, I am really addressing myself to the period we are concerned with here, unless I otherwise indicate. During that period what was the approximate membership of Local 10?

A. During that period?

Q. Yes.

A. Oh, I would say between four and five thousand.

Q. Between four thousand and five thousand members?

A. Yes.

Q. And are they all working members? That is to say, they work on the job except for full-time officials?

A. Except those that are injured, ill, or those who have reached their seniority and are pensioned off.

Q. Now, the territorial jurisdiction of the union, how far does it extend?

[fol. 91] A. You mean Local 10 union?

Q. Yes.

A. Local 10 extends—actually, its jurisdiction, they load ships—they have loaded ships as far as Monterey up to—up to Vallejo.

Q. Its offices and headquarters are in San Francisco?

A. That's correct.

Q. Most of the work performed by its members is performed in San Francisco and on the other side of the Bay?

A. East Bay Terminal, correct.

Q. Are the objects of the union set forth in this constitution?

A. That's correct, sir.

Q. All right. I will ask you to save time I will read it so the jury will be advised. This is in evidence. Article 1, Section 2, says:

[fol. 92] "The object of this union shall be to unite all longshoremen, carloaders and unloaders and other workers under the jurisdiction of the International Longshoremen's and Warehousemen's Union in the port of San Francisco and ports on the San Francisco Bay and tributary streams for the purpose of securing concert of action beneficial to their mutual interests."

That was then the stated purpose and is now; right?

A. That's correct, sir.

Q. Did it have a provision setting forth the qualifications for membership?

A. Yes, sir.

Q. I will read to you Article 2, Section 1:

"Applicants for membership must be men of good moral character attached to the principles of the preamble of this constitution who have reached their 21st birthday and are capable of doing longshore work."

That was the rule, right?

A. Right.

Q. There is another one that had to do with making out an application, paying an initiation fee and paying dues; that is true, isn't it?

A. That is true.

Q. Now, where is the preamble? Here it is. At the very outset of the constitution there is a portion called "Preamble." Is that to what the reference was that I just read in Article 2?

A. That's right.

Q. I will now read to you the Preamble:

"Preamble. We recognize that ability makes the man and not social wealth or distinction. We recognize there should be no class, racial, religious, political or nationality distinctions. We also recognize by experience that organizations of the working class and community of action is imperative and essential to combat the encroachments of organized and consolidated capital on the fundamental rights of labor. Therefore we, the members of Local 10, International Longshoremen & Warehousemen's Union, have associated ourselves in a union for an organized effort to remove these distinctions, to prevent the encroachment and to gain from capital the just fruits of our labor and have adopted this constitution and by-laws to govern us."

To your knowledge, how long has that preamble been in effect?

A. I believe it has been in effect ever since the inception of the union in 1933.

Q. That would be before the time that Mr. Brown ever became a member; is that right?

[fol. 94] Yes, sir.

Q. Do you have a provision in there about the duties of members in reference to their relations to each other and in their relations to the union?

A. Yes, sir.

Q. Article 3 entitled "Duties of Membership" reads as follows:

"Section 1, Subdivision A. All members must observe and abide by the constitution, by-laws, regulations and decisions of the union.

"Subdivision B. No individual member or group of members shall commit any act in the performance of

their work which will jeopardize the welfare of this union.

"Subdivision C. Every member having taken the pledge set forth in Article 2, Section 4, shall carry it out honestly and conscientiously."

That has always been the expression of the duties?

A. That's correct, sir.

Q. There is reference that I have just read to an oath taken on the admission of an applicant for membership. Is it correct that is to be found in Article 2, Section 4 and sets forth in quotes the following:

"An applicant, when initiated, must take the following pledge:

[fol. 95] " 'I,' " then giving his name, " 'do most solemnly upon my honor promise that during my connection with the International Longshoremen & Warehousemen's Union, I will remain a true and faithful member, observe its laws and regulations. I will attend the meetings of the International Longshoremen's & Warehousemen's Union in accordance with the rules adopted by this Local. I will assist a member of the International Longshoremen's & Warehousemen's Union when and wherever I may find him in distress. I will never knowingly wrong him or his.

" 'And further, I will strive to create a brotherly feeling between the International Longshoremen's & Warehousemen's Union and organizations which mean to uphold the dignity of labor and support the organized labor movement.

" 'And finally, I will not deal in any manner with any person who is an enemy of labor. To this I pledge my honor.' "

That is the oath taken by all the members?

A. That is correct, sir.

Q. Now, the affairs of the union are conducted by persons selected by the membership. That is true, isn't it?

A. That's true.

Q. Do you have—have you had during the indictment [fol. 96] period or any time in your experience, Mr. Ro-

hatch, any situation where somebody from up above gives orders as to who runs the union or anything like that?

A. No, the union is strictly run by the rank and file.

Q. You mentioned earlier today in reply to a question by Mr. Poole—you mentioned the word "autonomy." Would you elaborate a little for us on what you meant by that?

A. Well, autonomy rights means that each local has their own right to set up their own constitution, they set up their own dispatching and working rules and any other rules that they feel is necessary to run that local. And that's adopted by the entire membership. No one or two men do that; it's the entire membership.

Q. The membership elects, does it, all officers and board members who govern the union's affairs or handle the union's affairs?

A. They elect them by secret referendum ballot, using the city machinery just like you elect a congressman or mayor or supervisor. We use the regular city machines for that purpose.

Q. How do you get them?

A. We rent them, approximately \$20.00 a day, and we have to pay the city people who supervise the election, so that they are run properly, and we have a six-man election board that takes care of the election. In other words, they [fol. 97] sign the fellows in in their book and they vote and they stamp their books and see that everything is all right, you know, the voting is proper.

Q. If I understand you correctly—let me summarize it in a question—in the elections that are conducted in Local 10, the union rents the voting machines that the City of San Francisco uses during its elections?

A. Correct.

They are brought, are they, down to the waterfront area where the union is?

A. That's correct.

Q. They are there under the eyes of and serviced by city employees who are paid by the union to supervise the balloting?

A. See that the voting is carried out democratically, just as you do in your city elections. Same procedure.

Q. And to make a record of everybody who votes?

A. That's correct.

Q. And who had the keys to the machinery, the voting machinery?

A. The keys to the machinery, it's in the hands of Mr. Kelleher. He is the custodian of the City of San Francisco.

Q. City of San Francisco. And when the voting is all over, in the presence of a Ballot Committee that has on it union members to be witnesses, the actual tabulation is made by the city representatives, is that correct?

[fol. 98] A. It's actually made by the City, employees of the City, with the six-man board standing by to see that it is carried out.

Q. And then the results of an election are announced in that way?

A. That's correct, sir.

Q. And was that the process that was followed in each of the elections in 1958, 1959 and 1960, to which these ballots results relate that are here in evidence containing the name of Archie Brown, among others, as running for office?

A. All those people were elected in the same procedure in those years, yes, sir.

Q. By the way, when a longshoreman goes in to cast his ballot to vote on that machine, during that period was he provided with any place where he might do this privately?

[fol. 99] The Witness: Well, when a man votes, when he enters the voting area, he is checked to see if he is in good standing. In other words, his dues have to be paid up to the current month. And if that's so, he is checked on the roster just like you do in a city election; you have to sign your name. And then you are shown to a booth, the election machinery where the man gets inside, he pulls the curtain back just like you do in the city election, and he votes for whoever he wants to.

Q. Between 1959 and '61 the union had a president?

[fol. 100] A. That's correct.

Q. A vice-president, is that right?

A. An honorary vice-president.

Q. Honorary vice-president. It had a secretary-treasurer?

A. Yes, sir.

Q. And it had three business agents?

A. Correct, sir.

Q. Now, those were called in the constitution "the officers," right?

A. That's correct.

Q. That's Article 4, Section 1. Now, Section 2 also provides for certain committeemen and miscellaneous employees. That's correct, isn't it?

A. That's correct, sir.

Q. During this period were there dispatchers, a sergeant-at-arms, a janitor, a labor relations board of three members, delegates to all councils to which the local is affiliated, a board of trustees of five members, an executive board consisting of the officers and 35 other members, an investigating committee of 15 members, an appeals board of 15 members, a grievance committee of 15 members, a publicity committee of 3 members, and such other officers, dispatchers or committees as the local may deem necessary from time to time to elect for the business-like conduct of its affairs? Was that the situation?

[fol.101] A. That's correct, sir.

Q. So the Executive Board to which Mr. Brown was elected consisted of himself, 34 other men elected to it and the officers of the union at that time?

A. That's correct, sir.

Q. The constitution contained provisions describing how a man might come to be elected to one of these positions, did it not?

A. That's correct.

Q. In Article 5 it reads—it deals with nominations and with the election board; isn't that true?

A. That's correct, sir.

Q. And the one that I have read here indicates some changes and amendments in earlier years, but it was between 1959 and '61 the fact?

A. Yes.

Q. And it was followed, was it, in practice?

A. That's correct, sir.

Q. Article 5, Nominations, Section 1-A:

"Nominating petitions for officers, dispatchers, committeemen and miscellaneous employees provided for

in Article 4, Section 1 and 2, shall be presented at the last meeting in October and the first meeting in November of each year.

(b) The nominating petition must be signed by at [fol. 102] least 50 members in good standing and must designate the office for which the nominee is being nominated. All nominations must be approved by the membership.

(c) Only a member who has been in good standing for one year prior to the presentation of a nominating petition on his behalf shall be eligible as a candidate for any office.

(d) Candidates must be engaged in some branch of work under the jurisdiction of Local 10, ILWU, or be active in the affiliated trade union movement in the interest of Local 10.

(e) No member prohibited through judgment of the trial committee, approved by the membership, shall be eligible for nomination."

A. That's correct.

Q. It does not say there that a man has to get a petition signed by 50 people; it says that if a petition is filed with 50 names designating somebody, then that man is nominated: is that right?

A. That's correct.

Q. Mr. Rohatch, before the elections are held, are the members at membership meetings advised who the nominees are?

A. That's correct, sir.

Q. How often during this period did you have membership meetings?

A. What do you mean, how often?

Q. How often a month?

A. Well, we have them twice a month.

Q. Twice a month?

A. Yes.

Q. That has been the standard practice throughout that period?

A. Yes, sir.

Q. Could you tell what was the requirement, if there was

one, as to the size of a quorum that had to be present in order to hold a membership meeting?

A. That was 500, and it's been recently amended to 350.

Q. Between 1959 and 1961, then, 500 members of this union had to appear to make a quorum to conduct—

A. Two and a half years ago, 500, yes.

Q. —to conduct the business of the union membership. Now, was it the practice, and was it followed here, that at a meeting of the membership the list of nominees was read off?

A. That's correct.

Q. Will you tell us whether it was the practice that any member who had any objection to a nominee could or would or did make one?

A. That's right. That's right, sir. That's correct.

Q. In other words, if, let's say, Joe Jones had been [fol. 104] nominated for office and I as a member have some objection to voice to his running for office, I have the right to get up and object?

A. That's correct.

Q. And the membership has the right to take some action of some kind, does it?

A. Then they have a pro and con discussion and what the majority rules, that's it.

Q. Now, on all these occasions when Mr. Brown's name was before the membership on the ballot prior to that time, I take it that on each such occasion a petition had to be and was filed containing the names of 50 sponsors who were members in good standing of the union, is that right?

A. Otherwise he wouldn't be on the ballot.

Q. All right. And is it correct to say that his name was read off along with the others who were running at the membership meetings so that the members were apprised that he would be running for office?

A. Yes, sir.

Q. Was any objection ever raised by any member of the union against his running for office?

Mr. Poole: Objected to as being irrelevant and immaterial, if it please the Court.

The Court: I think it is.

[fol. 105] A. Not to my knowledge, sir, no, sir.

[fol. 106] Mr. Gladstein:

Q. The constitution provides how many votes a man must receive in order to be elected for the particular office he is running for. That's right, isn't it?

A. That's correct.

Q. A majority vote is required of all votes cast for the office of president in order to elect the president; that's right, isn't it?

A. That's correct, sir.

Q. The same is true of the honorary vice-president, the same is true of the secretary-treasurer and of all the business agents, of the dispatchers, of the sergeant-at-arms. It's been scratched out about the janitor; you no longer elect a janitor?

A. No.

Q. You employ one. Now, all others, that is, the committeemen, members on the Executive Board, all others except those I have just read, they are elected by a plurality vote?

A. A plurality, that's correct.

Q. That is, if 35 are running for the Executive Board, what is it, the top 35?

A. The top 35. The top 35 who receive the highest votes.

Q. Now, in Exhibit 3, which is the election results of November 1958 creating the officers who sit for what, a [fol. 107] year? During the year 1959? Is that what it is?

A. Yes, that's right; they are elected in the year '58 to serve for the year '59.

Q. They get inducted about the turn of the year, is that the way it is?

A. First meeting in January.

Q. All right. Now, I see that Mr. Martin J. Callaghan was elected president that year. That's correct, is it?

A. That's correct.

Q. All these people running for office in that one year, or are these two copies? Oh, you had a run-off election, is that it?

A. Yes. We got a real rank and file union. We are not run by a few people, you know.

Q. Well, let me go through this. It would appear that in that year, Mr. Rohatch, you had a primary and then you had a final election for those cases where there had not been a sufficient number of ballots received by a particular candidate in a particular race to elect him, is that right?

A. In other words, if there's three men running, the one man has to have more votes than the combined votes of the two other fellows.

Q. And if he doesn't get them the first time, then the two receiving the highest vote run it off?

A. Right.

[fol. 108] Q. Now, that year for the Publicity Committee it appears that there were seven men running and that the three who received the highest votes were Robert Rohatch 1467, Reino J. Erkkila 1423, Archie Brown 713, and the other four received votes in the 600 or 500 level. So you were one of those elected to that committee that year?

A. One of the lucky ones, yes, sir.

Q. The Publicity Committee, being a member of the Publicity Committee, does that have anything to do with being on the Executive Board? Is it the same or is it different?

A. No, it's separate. The Executive Board is the governing body of the union and the Publicity is a three-man committee that writes down the information necessary to carry on the union work.

Q. There were quite a lot of committees. You have an Area Labor Relations Committee, Promotions Committee, Caucus and Convention delegates, and so on, isn't that right?

A. That's correct.

Q. That year it appears that Mr. Brown ran for the Caucus and Convention. To what does the term "Caucus and Convention" refer?

A. That refers to—every second year we have what we call a biennial convention and everyone that's a delegate to that must be elected by the rank and file, and the caucus, that's a separate thing. Like the year 1962, we will have a [fol. 109] caucus next month, April 16th, in San Francisco and they have to be elected to that.

Q. How many delegates are elected to the caucus and convention?

A. Well, it varies. Sometimes there's 10, sometimes 15, sometimes 5.

Q. I see. Now I see, Mr. Rohatch, that you and Mr. Erkkila ran for that and were elected, Mr. Brown ran for that and was not elected to that caucus and convention. That is correct, is it not?

A. That's correct.

Q. That year you also ran and were elected vice-president?

A. Yes, sir.

Q. Now, I see that those who were elected to the executive board appear on the last page and next to the last page of that particular report, and it shows Mr. Brown being elected with a vote of 632. There were some elected with votes as little as 485, there were others who received votes of 900, oh, more than a thousand in some instances. The top 35, whoever they might be, is that correct?

A. That's true.

Q. Let's see. The following year, that is, the minutes or the election results of November 1959. That year Mr. Erkkila was elected the president; that's right, isn't it?

A. That's correct, sir.

[fol. 110] Q. That year Mr. Brown, it shows here, and these are correct figures, the tabulations, aren't they?

A. Yes.

Q. It shows that he received 743 votes to the Executive Board and was elected, that some members of the union were elected to that board receiving fewer votes, down into the 622 range I see here, and there were, well, even 560. There were some who had larger votes, over a thousand votes—over 1,100, in fact. And finally, in the election of November 1960 Mr. Erkkila was elected president again, Mr. Brown ran again for caucus and convention delegate, and there having been a passage of two years in between, he received 575 votes but was not elected. You, Mr. Rohatch, also ran as a caucus and convention delegate and you received more than 841 votes and you were elected as a delegate?

A. Yes, sir.

Q. And the Executive Board, Mr. Brown—I have that figure. Or did I give that? I don't think so. Mr. Brown got 630. Well, I don't know whether it is 634 or 684 on the Executive Board. And let's see, this indictment came out in May of 1961, last year, and you had an election in November of that year, too, didn't you?

A. Yes.

Q. Is Mr. Brown still on the Executive Board?

A. That's correct, sir.

[fol. 111] Q. By reason of being elected again in November of last year?

A. That's correct, sir.

Q. Now, the Executive Board has its powers and duties set forth in the constitution itself, correct?

A. Correct.

Q. Now, is it to be found in that portion of Article 16 which is designated here as Section 10 with a title "Executive Board"?

A. Correct, sir.

Q. That refers to the Executive Board of Local 10?

A. To Local 10 only, yes.

Q. The very one to which Mr. Brown was elected on these occasions?

A. That's correct.

Q. All right, I will read it to you: Section 10, Subdivision.

(a). "The Executive Board shall be the advisory board of the Local. They shall have the power to adopt such measures as are deemed necessary from time to time for the good and welfare of the Local, subject to the approval of the membership.

(b). The Executive Board shall attend to all matters referred to it by the Local, also suggest remedies for immediate and permanent benefit and report to the regular meeting.

[fol. 112] (c). They shall have the power to dispose of communications not of interest to the Local and cooperate in every way so that the business to be covered at a regular meeting may be accomplished.

(d). In cases of emergency, the Executive Board is empowered to act to protect the interests and welfare of the Local.

(e). They must study the labor movement closely and formulate concrete policies to strengthen our Local. Said Policies to be in accord with the ILWU.

(f). They shall keep records of any and all meetings of their committee or any subcommittee.

(g). A minimum of 10 members shall constitute a quorum of the Executive Board."

Now, is there anywhere else at all, anything to be found concerning the powers or duties of the Executive Board other than what I have just read?

A. No.

Q. That's it?

A. That's in the constitution.

Q. Does that board have—did it ever have the power to call a strike?

A. No, sir.

Mr. Poole: Objected to as being irrelevant and immaterial. [fol. 113] The Court: The answer may go out. We have specifically here the constitution. It is read.

Q. Have you ever known, in your membership in the union, for the Executive Board to call a strike?

A. At no time.

Mr. Poole: If Your Honor please, at this time I will make the same objection to the question, that it is irrelevant, and if there is an answer of the witness, I will ask it be stricken.

[fol. 114] The Court: Yes, the answer may go out.

Mr. Poole: The issue of this case does not involve whether or not the Executive Board of the ILWU Local 10 has the power or has called for or has attempted to call a strike.

[fol. 115] The Court:

Furthermore, under this statute I think it is immaterial what the powers are of the particular board. It is my feeling in the matter, and I will sustain the objection.

[fol. 116-117] Q. Now are there any provisions in the Constitution, Mr. Rohatch, that do deal with strikes or lockouts?

A. Yes, sir.

Q. Article 18 is entitled, "Strikes and Lockouts". You are familiar with that provision?

A. That is correct.

Q. I will read it to you.

[fol. 118] Mr. Gladstein: (Reading):

"Article 18, Section ..

"In the event of a serious dispute between the members and their employers, notice shall immediately be given the Executive Committee and they shall endeavor to avoid strikes and make every effort to settle the matter amicably."

Q. I will interrupt my reading to ask you, Mr. Rohatch, does the expression "Executive Committee" in that section refer to some group other than the Executive Board, or is it the same?

A. The same.

Mr. Gladstein: Now, Section 2:

"A strike shall be authorized by this local only after complying with the following procedure:

(a) A meeting stating the purpose for which it is to be called shall be advertised:

(b) A quorum of 1,000 or more members in good

[fol. 119] standing must be present at said meeting:

(c) A referendum vote by ballot must be taken. The majority must vote in the affirmative.

(d) The ILWU International must be notified in conformity with our Constitution and By-Laws. All laws pertaining to calling of a strike must be strictly carried out."

Q. That was in effect during all that time?

A. That's correct.

[fol. 120] Mr. Gladstein: Q. There hasn't been any strike or lockout of your union since 1948?

Mr. Poole: We will object to that as irrelevant.

The Court: I will sustain the objection. This has no relevancy whatsoever.

Mr. Poole:

May I suggest if Mr. Gladstein has an offer of proof along this line—

[fol. 121] (Thereupon, the jury retired from the courtroom and the following proceedings were had outside the presence of the jury.)

The Court: All right, Mr. Gladstein, do you want to make your offer now?

OFFER OF PROOF

Mr. Gladstein: Thank you, Your Honor.

I offer to prove if I were permitted to question the present witness and he was permitted to answer, that he would testify in substance that not since 1948 has Local 10 been engaged in any strike or lockout in the City of San Francisco.

Furthermore, in that connection, I would want to ask him, and if he were permitted to answer it, I will elicit from him that during the 1948 strike Local 10 notwithstanding the tie-up of certain ships, at the request of the armed forces, moved such cargo as was requested by them and received commendation in this very courthouse during an injunction proceeding that involved a group of unions and the National Labor Relations Board and so forth and so on—Mr. Rohatch was there, I believe. That, in essence, would be what the offer of proof is.

[fol. 122] The Court: Well, in my view of the statute, as I have expressed, I don't think that would be relevant. This statute does not require action by Mr. Brown as to a strike or action of that kind beyond the almost literal words of the statute.

Mr. Gladstein: But my offer of proof goes partly to Mr. Brown and partly to the union. What I am trying to say is that by my offer of proof from this witness I would seek to establish in one part that Mr. Brown's conduct was such that he neither did nor sought to bring into existence [fol. 123] any interference with commerce of any kind, and, on the other hand, the Executive Board on which he sat and the members of the union itself during that same period—I am now talking about the indictment period—similarly neither engaged in or undertook to engage in or talked about engaging in any interference, any action that would interfere with or paralyze commerce.

The Court: I would agree that if it were relevant as to one it would be as to the other. By the same basis I don't think it would be as to the union any more than it was to Mr. Brown.

Mr. Gladstein: Would Your Honor mind listening to Mr. Leonard?

The Court: Oh, no. Certainly, Mr. Leonard.

Mr. Leonard: I will just make a few remarks in reply to the statement by the Government.

As the Court now views the statute, proof that there

was such conduct on the part of Mr. Brown is not necessary to the Government's case. May I suggest that the offer of proof that Mr. Gladstein just made, while it might not be necessary to the Government's case, is properly offered as part of the defense to the charge. If the Government makes out a prima facie case, it is our view of the statute that in defending against the charge, the defense has got the right to bring before the jury the fact that this conduct [fol. 124] as described by Mr. Gladstein in his offer of proof took place. So whether it is part of the Government's case or not, it is at least part of our defense, and I submit for that reason we are entitled to have it before the jury.

The Court: Did you want to be heard?

Mr. Poole: I think Your Honor has ruled on this matter several times.

The Court: Certainly; I think it is the same principle and the same thing. No matter whether we look at it as affirmative or defense matter by the defense, I think the same conclusion is reached. It will be my ruling then that the objection will be sustained.

Mr. Gladstein: Q. Before leaving the Constitution, I overlooked one passage having to do with the tenure of office. For how long a period—it would appear that you have an election every year; that is right, isn't it?

A. That is correct, sir.

Q. So that men are elected to offices for a one-year term?

A. Yes.

Q. In the case of officers, you have the office of president and you have the office of secretary-treasurer—the paid officers. For how many consecutive terms are they permitted to hold office?

[fol. 125] A. They can serve for two consecutive terms although they must be elected each year.

Q. And that is by virtue of Article 6, Section 5, which says: "Any salaries elective officer who has served two full consecutive terms of one year each shall not be eligible again to hold office in this local until the expiration of one year." That's right?

A. That's right. Actually, Mr. Gladstein, they have the two years and then they have to return to work for one

year. We call it point of production, or the salt mines, as it is termed.

Q. That applies to the salaries officials?

A. That's correct.

Q. I take it then that the members of the Executive Board against whom this proscription does not apply do not receive any pay for services on the Board; is that correct?

A. That's correct.

Q. Other than the salaried officers, who, as the Constitution points out—I have read that—are also members of the Executive Board, is it true that all of the 35 who are elected are working in the industry?

A. That's correct.

Q. A portion of the minutes of October 21, 1959 was read to you, Mr. Rohatch.

With Your Honor's permission—the minutes are rather [fol. 126] short—I would like to read all of the minutes of that meeting and perhaps all of two or three others so as to acquaint the jurors with what typically, if it is typical, takes place at a meeting of the Executive Board, or did take place during the period of the indictment.

The Court: Go ahead.

Mr. Gladstein: That is, to read the full text, not just from. There may be some more than three or four that have to do with Mr. Brown. Anyway, this is the minute and this is how it reads:

“I.L.W.U. LOCAL 10

MINUTES OF REGULAR EXECUTIVE BOARD MEETING
WEDNESDAY, OCTOBER 21, 1959
400 NORTH POINT STREET”

[fol. 127] Now I notice on the right side there is typed or mimeographed in, Mr. Rohatch, “Concurred, M 12/7/59.”

Q. Is that a reference to a procedure whereby at Executive Board meetings the minutes of the prior meeting are

read to the assembled Executive Board members so they can adopt them as read or as they amend them?

A. No. That which you see on the right-hand side means that that set of minutes has been concurred in by the membership following that.

Q. So that where you find a minute which has on it "Concurred M", the "M" means the members at a union membership meeting?

A. That is correct.

Q. And the date would be the date of the union membership meeting that concurred?

A. Let me say this also: It may be a little clearer. They may move, second and carry to concur. There may be some exceptions in it. There may be some of the membership wants to take exceptions to some of the motions in that particular set of minutes, and that is noted, and after those minutes are handed in then that exception is taken care of and there is pro and con discussion and then the membership either votes for it or rejects it.

Q. I would then draw from what you have told us that it was the practice during the indictment period for the [fol. 128] minutes of every Executive Board meeting to be written up and to subsequently be read to a regular membership meeting and for the members at the membership meeting to take a vote as to whether they concurred in the actions reported by the Executive Board?

A. That's correct.

Mr. Gladstein: (Reading):

[fol. 129] "Letter dated October 20, 1959 from Louis Goldblatt, International Secretary-Treasurer regarding the Kennedy-Landrum-Griffin bill. Copy attached to these minutes.

"M/S/C To Concur."

Q. Now does that mean that a motion was made, a second was made, and a vote was taken and the Executive

Board there assembled adopted the motion to concur in the letter that Mr. Goldblatt sent?

A. That's correct.

Mr. Gladstein: (Reading):

"M/S/C by Bertani. To call a special Executive [fol. 130] Board meeting for October 29 and to invite President Bridges; also lawyers to give complete analysis of new labor act.

Q. "M/S/C Stout"—that was a motion made by Mr. Stout and it was moved, seconded and carried, right?

A. Correct.

Mr. Gladstein: (Reading):

"To contact union attorneys immediately and for them to give in writing their legal interpretation of the law to all committee men, officials, dispatchers, etc.

"M/S/C"—that means moved, seconded and carried, a motion by Stout—"that the next regular membership meeting be a stop work meeting (November 2, 1959):"

Q. What is meant by a stop work meeting?

A. A stop work meeting is when all work stops with the exception of military, perishables, baggage or mail.

[fols. 131-133] Q. And is this so that at a given time, a matter of unusual importance is taken up, and this is the method of obtaining the largest possible attendance of the men?

A. That's correct, sir.

Q. So that they are all required to attend except those who are working on military cargo and perishables?

A. That's correct.

Q. Incidentally, is it true that in the agreement, the collective bargaining agreement that your union has with the shippers' association, the employers of longshore labor, that there is a provision in it which recognizes the right of the union to call such a stop work meeting for purposes of that kind?

A. One stop work meeting a month, that's correct.

[fol. 134] Mr. Gladstein: (Reading):

"Letter from the San Francisco Branch of the National Association for the Advancement of Colored People. Copy attached to these minutes.

Q. This letter--these letters were read at the Executive Board meetings?

A. Yes, sir.

Q. And they form, and that's under that provision of the powers or duties of the Board that I read a while ago, that says they shall reply to communications?

A. That's correct.

Q. All right. This is on the letterhead of the San Francisco Branch, National Association for the Advancement of Colored People, 2085 Sutter Street, San Francisco 15, California. October 2, 1959.

"Dear Brothers:

"The Labor and Industry Committee of the San Francisco Branch of the NAACP is planning a conference to be held the weekend of November 27-28, 1959. Our subject, "The Plight of the Negro Worker in San Francisco." We will attempt at this [fol. 135] conference to determine the exact nature of any and all job bias in our city. Full discussions will be held concerning the the following issues among others:

1. Where and how is the Negro employed?
2. The methods of apprenticeship and upgrading. How does the Negro worker fare in apprenticeship and promotion program.
3. Employer discrimination.
4. Union discrimination.

"In view of the valiant effort put forth by the San Francisco Labor Movement in the recent struggles for local and state-wide FEP laws, we feel that you will want to contribute to the success of this conference.

Please elect and send at least four official delegates from your union or organization. The exact date, time and place of the conference, together with registration details, will be given in a letter to follow.

"Sincerely yours, Granville Jackson, President,
Richard A. Bancroft, Chairman, Labor and Industry
Committee."

Following that there is a motion saying, "Moved, seconded and carried to concur and elect from membership [fols. 136-138] meetings."

Just for clarity, does that mean, Mr. Rohatch, that at the next meeting of the membership, they would hear this and your Board's recommendation would be that the membership elect four people from the floor?

A. From the floor.

Q. To attend as delegates to this National Association for the Advancement of Colored People meeting?

A. That's correct.

Q. Then the next is "M/S/C Stout:" Mr. Stout made a motion that was seconded and carried, to send a congratulatory letter on the transfer of Brother Talmadge Wills, Jr. to ILWU Local 91.

"Letter from International Union of Mine, Mill and Smelter Workers Union dated October 9, 1959. Copy attached to these minutes."

[fol. 139] "Mr. George Bradley, Secretary,
Local 10, ILWU,
400 North Point Street,
San Francisco, California.

"Dear Sir and Brother:

"We are addressing an appeal to your union on behalf of 14 of our present and former officers and staff members who are scheduled to go on trial in Denver on October 26, 1959, for an alleged conspiracy to defraud the Government by use of the Taft-Hartley affidavit. This trial is the latest in a series of harassments directed against our union in the hope of weak-

ening its bargaining position and ultimately destroying it. It is scheduled to take place at a very time when we are on strike against the five major mining companies in the copper industry for their refusal to sit [fol. 140] down and negotiate a new agreement. This indictment is three years old. It came shortly after the Government convicted our former secretary-treasurer, Maurice Travis, of allegedly signing a false affidavit, and while the case of Quentin Jenks, a former local union officer, was awaiting decision of the Supreme Court on appeal from a similar conviction. The Jenks case, of course, is now history. The original Travis conviction and eight-year sentence were reversed on appeal and Travis has since been retried and his case is now going to the Supreme Court. Only a few short months ago, our Eastern Vice-President, Asbury Howard, was released after serving a five-months sentence in Alabama for the 'crime' of reprinting a cartoon from the Kansas City Call, urging his fellow citizens to register and vote. There is no need for us to stress the importance of this case. This is the first mass trial of a group of active union leaders based on the infamous Taft-Hartley affidavit. This is a conspiracy trial, a dragnet used since the very inception of the trade union movement, to harass it and destroy its effectiveness. The history of our union, beginning with the Western Federation of Miners, is replete with trials for 'conspiracy' to organize, to strike and to live. The present indictment [fol. 141] accuses us of conspiring to obtain compliance on behalf of mine and mill with the filing requirements of Taft-Hartley (sic). It goes back to the year 1949. Since that time we have secured on behalf of our membership the following benefits: An increase of over \$1 an hour in wages; in 1949 a copper miner earned \$63.96 a week. Today he makes \$106.09 for the same week. Industry-wide pension plans ranging from \$2.25 to \$2.50 per month for each year of service with the company. Comprehensive health and welfare plans which are being constantly broadened in range of benefits and coverage of dependents. Group life insurance. Greatly improved paid vacation standards, more paid

holidays. Increase shift premium pay. And for the first time this year in our industry, a break-through providing a supplement unemployment benefit program. This is our real crime. All of these cases have cost a great deal of money. The forthcoming trial will be the costliest. It is estimated that it will last at least three months. Money for these cases in the main has been raised by voluntary contributions from our rank and file members. At the moment the overwhelming majority of our members are on strike and [fol. 142] themselves in need of assistance. We are therefore appealing to you for financial assistance in the defense of our union brothers.

"Sincerely and fraternally, John Clark, President."

Now after that letter it appears that Mr. Franklin, identified in the roll call as O. Franklin, made a motion which was seconded and carried that we recommend \$1 assessment to the membership to help the Mine, Mill and Smelter Union. That means that each member be assessed \$1!

A. That's correct, sir.

Q. To forward as a contribution to that union. Oh, yes, and then there are some. . . . Can you read what it says? Oh, there's no further writing after that. All right.

And that, I take it, was concurred in by the action of the subsequent month by the membership?

A. That's correct.

Q. Now to continue with the minutes of that meeting.

"Motion referred to the Executive Board on Caucus Delegates."

Moved and seconded—moved by Smith and seconded, to send 20 delegates to the next caucus. Amendment by Brown with a second that these 20 delegates be elected to membership meeting. That means the union membership. Then an amendment to the amendment, the last authored by Bertani, and seconded, that:

[fol. 143] "20 delegates be elected in the next caucus and their names be placed on the coming ballots. Also

five observers be selected from meeting prior to caucus."

Then a substitute for the whole, moved, seconded and carried, that 20 delegates be elected at the coming annual election.

The annual election—that is it?

A. Yes.

Q. Then "Dock Exemption Board." Where it says things like that, Mr. Rohatch, I suppose it goes without saying that there is discussion before you have motions and seconds and so forth?

A. Quite a bit.

Q. How long do your meetings usually last?

A. Oh, midnight or after.

Q. Moved by Melin and seconded, that all violators of exemption cards be cited before the Grievance Committee for membership rule violation. Does that mean for violation of membership rules?

A. That's right, if anyone does that.

Q. What is the exemption card and what was this about, for our understanding?

A. Well, the exemption card is where a man is hurt [fol. 144] physically or he is sick and he is given a job where he just hooks on the loads. He doesn't manually handle anything. So that he may have a heart condition or may have had a stroke or something. They usually give these to men who are really hurt physically in one way or another.

Q. So then this motion apparently is directed to the thought that there might have been some taking advantage of that rule, is that right, sir?

A. That's correct, sir.

Q. Then there was an amendment by Mr. Smith which was seconded, to combine light work cards and dock exemption cards and to revoke all cards and start the new year with the issuance of new cards. Let me interrupt to ask this: The dock exemption cards would be the cards issued to those who had suffered the kind of injury that you have just mentioned?

A. That's correct.

Q. Light work cards; those are issued, are they, to men who have sustained back injuries or things of that kind?

A. That's correct.

Q. Then amendment to the amendment, it was seconded, that the business agents check all exemption cards immediately in the hiring hall, and then the substitute to the whole, moved, seconded and carried, the motion by Franklin, that all violators of exemption card rules be cited to the Grievance Committee and those in violation, their cards [fols. 145-146] to be picked up. Then there was a motion, seconded and carried, the motion by Stout, that no B man shall be allowed to continue to operate any mechanical device when there is an A man ready, willing and able to change jobs with him. Letter to be sent to the stewards on this action. Moved, seconded and carried, Franklin, is the author, that Section 3, Page 9 of the contract be lived up to.

Mr. Gladstein: The next one says, "Moved, seconded and carried, Barlow", that Bill Kirby, and then I don't read the rest of it, because . . . What does that say?

The Witness: "Moved, seconded and carried, Barlow, that Bill Kirby, Welfare Director, be allowed \$60 a month expense account to reimburse him for out-of-pocket expense, to be retroactive from July 1, '59."

[fol. 147] Q. Oh, I see. Well, then, let's read that. It says:

"Visitors—Sub-Committee: Huber, Saunders and Riley."

Does that mean that a sub-committee of three with those names was created dealing with some question of visiting longshoremen?

A. They process visitors.

Q. I see. Then there is a motion made, seconded and carried, to concur in the visitor's sub-committee report?

A. That's of Huber, Saunders and Riley. They concurred with whatever action they took for the visitors.

Q. And a similar motion; another motion, was carried to approve the Investigating Committee Report?

A. Yes.

Q. That is, there had been a report given by the Investigating Committee and this was the motion to approve?

A. It was concurred in.

[fols. 148-151] Q. All right. Now that completes all of the minutes of that meeting?

A. Um hum.

Q. You have the original there?

A. Yes.

Q. I will put this together. There are these two pages attached. One of them I shall not read; one of them has the list of names of people who are visiting in this port from other local unions that you are affiliated with?

A. Up and down the Coast, yes, sir.

Q. Yes, I see some men here from Hawaii, some from Anchorage, Alaska?

A. And Canada, too.

Q. And Canada, too. Seattle and so forth. And that is the group to which—

A. The visiting privileges were extended.

Q. And that is the sub-committee on visitors?

A. Yes.

Q. Then there is another page, and I won't go into that, that has the minutes of the Investigating Committee that, apparently from your explanation of it, was read to this meeting of the Executive Board, whose minutes I have been reading, is that correct?

A. That's correct. They were granted exemption for one reason or another.

[fols. 152-153] FRIDAY, MARCH 30, 1962

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[fols. 154-155] ROBERT ROHATCH, called as a witness by the plaintiff, having been previously sworn, resumed, the stand and testified further as follows:

Cross-Examination (resumed)

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Mr. Gladstein: I told the Court that I felt it was our duty, and we will discharge it, to read to the jury everything said or done, as the minutes show, by Mr. Brown—everything.

.

[fol. 156] Mr. Gladstein: All right. Now those minutes, Mr. Poole, are the meeting of November 12, 1959.

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[fol. 157] On the following page, about two-thirds of the way down, I read this:

“Request by Brother Archie Brown to attend the Housing Conference on November 14th, which is sponsored by the Council for Civic Unity, which will be held at the Marina Junior High School. Moved by Saunders, seconded and carried, to grant the request. Two delegates are to attend.”

Then the minutes of January 28, 1960, concurred in on February 15, 1960. Archie Brown shown present by the roll call. The portion on page 1 reads as follows:

“President Erkkila read the proposed agenda and stated that if there was no objection to it, such would be the regular order of business with the Executive Board. Following the order of the agenda, President Erkkila reported on the Labor Relations Committee

situation as it now stands and informed the Board of the facts and said our proposal is still the same, open meetings, no more, no less. We are the only port in this area that has closed meetings, he said, and he cited [fol. 158] the Portland local as an example, which was faced with a similar situation, but after several months, it was resolved and they now have open meetings. And he said further that special bulletins will be issued giving all the facts on the situation. Business Agent Tommy Silas reported that we had checked with the Coast Committee and the International officers and that they had stated that our position on this matter was a sound one. Moved by Bretani, seconded, that we commend the officers for their position in breaking off the Labor Relations Committee meetings until they are open to the membership, and further, that we recommend to the membership continuing full support of their position. M/S/C to close the debate."

• That had to do with terminating secret meetings, is that right?

A. Well, in the past, they have had what they—what they had done before was, they had three members of the employers and three members of the union, used to have a meeting without the rank and file sitting in, and when that was passed, then the rank and file could sit in and listen to what was going on.

Q. I see on page 2 a request from Gang Boss Wildersen to have the Grievance Committee reopen his case.

[fol. 159] : "Moved by Magee and seconded that we instruct the Grievance Committee to hear the Wildersen case again. Chairman entertained the motion. Business Agent Tommy Silas then appealed the decision of the Chair, Vice-President Christiansen served as chairman. Brother Silas said the reason he was making the appeal was that the Grievance Committee had made its decision and Brother Wildersen did not appeal at that time, therefore the decision of the Grievance Committee is final. President Erkkila then stated it was his understanding that due process of his constitutional rights was not accorded to this brother.

Vice-President Christiansen then conducted the vote and stated that the decision of the Chair had lost. Moved by Stout and seconded that we hear from Brother Wildersen regarding his union constitutional rights. Brother Wildersen addressed the Board and said that these were the constitutional rights which he felt the Grievance Committee had not complied with: No. 1, that the Grievance Committee refused to hear his gang steward; No. 2, that they levied a fine, which is not provided for in the Constitution; No. 3, that the chairman of the Grievance Committee had advised him not to appeal."

Then there is a motion following by Brown, seconded [fol. 160] and carried, to move on to the next order of business. And further, at the end of the page, there is another motion by Mr. Brown to hold over the balance of the business until the next meeting. That was carried and the meeting adjourned at 11:50 p.m.

Now in the minutes of February 11, 1960, which appear to have been concurred in by the membership on April 4, 1960, page 1, I read, "A privileged motion by Brother Chester—"

Mr. Poole: Was Mr. Brown present at that one, Mr. Gladstein?

Mr. Gladstein: I don't see it. I don't see whether he was or not. It's not in the roll call. Well, he was; it shows it later on—he made a request.

Q. Do they sometimes come in late?

A. That's correct. Usual procedure is, they have a roster list, but there's many times that the members on the Board, either through oversight or just from plain being tired, I guess, they just forget to sign the list, the roll call.

Q. Well, on page 3 there is a request from Brother Brown. Now I don't know whether he was present. In any event, this deals on page 1 with a subject that Mr. Poole offered some evidence about here yesterday, this Fresno conference, the conference at Fresno, California. So this is the privileged motion by Brother Chester in February 1960.

[fol. 161] "Moved, seconded and carried that the Executive Board go on record by giving the president,

who was absent from this meeting, the privilege of attending the Democratic Conference in Fresno."

That was Mr. Erkkila at that time, the president?

A. That's correct, sir.

Q. Now you can tell us, can't you, Mr. Rohatch, it is true that Mr. Brown himself was not elected as a delegate to that Fresno Conference?

A. That's correct.

Q. From the minutes of February 25, 1960, which appear to have been occurred in on April 4, 1960, in other words, it would appear on that occasion, Mr. Rohatch, that in the membership meeting in April, the minutes of two meetings of the Executive Board were referred to the membership, is that right?

A. That's correct.

Q. Was there a lapse of membership meetings or how—

A. Well, once in a while it's a lapse of—sometimes it's bad weather and sometimes pressure of the gangs working, that they are not able to attend the meeting.

Q. Don't get a quorum, in other words?

A. The number of gangs working the port.

Q. All right. Now in the meeting of February 25, about 25 were present and half a dozen stated to be excused. On [fol. 162] the first page:

"Moved and seconded, moved by Brown, seconded, that the officers bring in recommendations for application and procedures for transfer to Clerks. An amendment by Osborne that no further applications for transfer be considered by the Labor Relations Committee until such time as the transfer system is established. Amendment to amendment by James that the local officers be instructed to work with the Coast Committee on the transfer of longshoremen to the Clerks Union and local officers report back to this Executive Board the procedures so recommended. Vote on the amendment to the amendment, carried." Now to what did that have reference?

A. That had reference to transferring of longshoremen to the Marine Clerks, who check the cargo in and out of the ships. Well, actually, a longshoreman, it's an upgrading; it's a chance for him to go up the ladder.

Q. Now attached to these minutes is a page reading:

"From the Executive Board meeting of February 25, 1960, proposals by Brother Brown. 1. Proper arrangements shall be made by the Labor Relations Committee to demote men promoted from B list to A list when work falls off or conditions warrant, B men will be required to sign a pledge to this effect upon [fol. 163] being promoted; 2, following the induction of the first batch of 162 men, the procedure shall be to induct an individual 15 a month or the number who die or retire per month, whichever is greater. This shall begin with the month of December, 1959. 3. Any A man who takes a withdrawal on his own volition shall be eligible to come back if men are still being taken from B list. 4. Recommend to Investigating Committee to withhold promotion for contractual violations, so arrange with Labor Relations Committee."

To what did that have reference?

A. You are speaking about the B list, right?

Q. A and B list.

A. Well, that had reference to men being taken in as B men from—B men is considered actually a permit man and from a permit man to an A registration, which is called a steady man, or—he has got preference of employment.

Q. Now on page 2 of those same minutes it appears there was a motion by Mr. Brown. . . . No, this contains the very same text that I have just read. And then an amendment by Hogan, and then a motion by Mr. Chester:

"Seconded and carried as follows: that we have a special meeting of the Executive Board and that Brother Brown's proposals be mimeographed along [fol. 164] with the proposals of the sub-committee, for distribution to Board members, and that the International president, International President Bridges,

Chairman of the Coast Committee, be invited to attend next Thursday."

Q That had reference to the same B list?

A. That's correct, sir.

Q. Then it appears on March 3, 1960, there was a meeting of the Executive Board, and in the text it is called a special meeting for the purpose of examining this question of the A and B list, and Mr. Brown participated there, making a motion to accept a sub-committee report.

March 24, 1960, concurred in by the membership in June, on June 20, 1960, a meeting with, oh, twenty or more names shown as present, including the defendant, and a motion made, seconded and carried to reaffirm "our former position that all committee hearings shall be open to members of the local who are in good standing. If they create a disturbance in meetings, they shall be removed."

Also on page 1, a news release from our International was read regarding the newspaper strike in Portland, Oregon, copy attached. Motion was made and carried to support the newspaper guild and refer the question of financial support to the Board of Trustees.

Where there is no indication as to who the author was of a motion, it is not possible now, unless one happens to [fol. 165] remember it, to establish whether Mr. Brown did or did not make a particular motion; that would be right, wouldn't it?

A. That's correct.

Q. Well, just as indicating the various things that took place at that meeting, where action was taken, that it's not possible to find from the minutes to what extent Mr. Brown was the author of any motion, they included a petition from the lift drivers regarding some complaint they had about jobs, the Stewards Council had some business they wanted taken up in regard to the hiring hall, a question was raised about parking violations—members found guilty of refusing to move their cars when ordered by the parking attendant at the union hall. At the grounds of the union hall there are parking spaces and there are some rules regulating how much and how often a car may be parked there, is that it?

A. That's correct.

Q. Oh—first offense \$5, second offense. . . .

And Labor Relations Committee matters. And here is one on page 3 called "Political action:

"Moved and seconded that we reactivate all the standing political action committees and that the first meeting will take place next Wednesday night, March 30, 1960. Moved, seconded and carried to close the debate and vote on the motion carried."

Then Henry Schmidt, ILWU Pension Director, who was [fol. 166] delegated by the ILWU Northern California District Council, reported on the meeting. This is a meeting of the Unitarian Church World Peace Conference—reported on the meeting which was held in the interest of world peace. He said that:

"They planned to hold several meetings, one of which will be a huge rally in Union Square with many prominent speakers. Later they will send a delegation to the Summit Meeting in Geneva, Switzerland, to protest the manufacturing of nuclear arms. Moved by Osborne, seconded, that we support the activities of this group and encourage our members to attend and participate in their meetings. Amendment that we designate Brother Brown and Brother Osborne as delegates to attend the meeting of March 26, 1960. Vote on the motion as amended, carried.

"Motion by Kearny——"

Which Kearny was at one time president of the union?

A. James Kearny. Yes, sir.

Q. And on this occasion was a member of the Executive Board?

A. That's right.

Q. "The Executive Board shall extend an invitation to the local and Oakland chapter of the NAACP and the Urban League, to send a representative on different nights to the Executive Board for the purpose of informing the [fol. 167] Board what problems of discrimination exist in San Francisco and the East Bay, how we can assist in the correction of these situations and how we can assist the current struggle in the South against discrimination."

There is attached to these minutes a letter on the letter-

head of the International union dated March 21, 1960, to all ILWU local unions:

"Dear Brothers and Sisters:

"In keeping with the international referendum—"

May I ask, what is an international referendum?

A. That's when a referendum is held of all the locals up and down the Coast and Hawaii, Canada and Alaska.

[fol. 168] Q. In what manner is the voting done?

A. International elections That is done by—in the past it has been done by the Australian ballot.

Q. "The last meeting of the International Executive Board to start setting up rank and file delegations to go overseas."

Here is the procedure that was adopted:

"1. As provided by the referendum ballot the overseas delegation fund will be used solely for travel, wages and expenses of delegates of local unions. No part of the fund will be used for the payment of expenses of international officers, international executive board member, or international staff. If any are designated to accompany the delegation their expenses will be paid by the international office and not by the overseas fund.

"2. Each local may nominate as many candidates as it desires for consideration by the next meeting of the International Executive Board which is to take place within the next 60 or 90 days. Such nominees can be selected in any manner the local sees fit.

"3. Final selection of delegates and the itinerary will be made by the International Executive Board. General rules will be followed, provided they have sufficient funds, each Executive Board area of the [fol. 169] International union will be allotted twice as many overseas delegates as it has representatives on the Board.

"We will appreciate your cooperation in having names of your nominees forwarded to this office in the near future.

"Fraternally, Harry Bridges, President, Louis Goldblatt, Secretary-Treasurer."

What was that overseas delegation that this talks about?

A. That was voted on in the convention caucus, biennial convention, to send delegates overseas to study the conditions in the various countries in Europe and Asia and Africa, Cuba and many islands, to find out conditions—how they existed and to come back and make a report back to the—

Q. Was that in particular reference to waterfront conditions and working conditions and the manner of handling cargo as well?

A. Correct, and also their conditions, how they lived and their standard of living.

Q. From the minutes of April 14, 1960, concurred in by the membership on June 20, 1960, on page 1 I see:

“Minutes of the Political Action Sub-committee were read. Brother Archie Brown also reported for the [fol. 170] Political Action Sub-committee.

“Moved, seconded and carried to adopt the minutes and concur in the report.

“Privileged motion by Brother Saunders:

“I make a motion that Local 10 go on record for a 24-hour work stoppage in protest of the murderous acts committed upon the people of South Africa, also the acts committed against the people of the southern part of the United States in their present boycott action. Copy to be sent to all ILWU locals. I move that this latter be referred to the Executive Board and that we join with the workers of Great Britain who are making similar protests in boycotting goods from and to South Africa.

“Moved, seconded and carried that we follow the caucus recommendation on that part which refers to the boycott of the South African goods.”

For the second part:

“Moved, seconded and carried that we have a 24-hour work stoppage to protest the present boycott action against Negroes which is going on in the southern part of the United States.

“Moved, seconded and carried by Christensen that

we have a stop-work meeting and that the first order of business be the caucus reports. [fol. 171] "Moved, seconded and carried by Tommy Silas that we deviate for the time being from the adopted agenda to hear International President Bridges.

"Brother Bridges reported in great detail on the Mechanization Fund. He said that there is a great need for understanding among the rank and file in this question and he emphasized that the local officers have a job to do in informing the members on this matter."

Attached to these minutes are minutes of March 30, 1960:

"Chairman Erkkila informed the committee"—this is ILWU Local 10 legislative meeting of all standing committees.

Q. What does that mean, Mr. Rohatch?

A. A legislative meeting of all standing committees—that means that all standing committees in the local are requested to attend that meeting—

Q. A meeting. And this one, it appears, was called to order at 8:15 p.m. by President R. J. Erkkila, and it shows as present, among others, Archie Brown.

"Chairman Erkkila informed the committee that this would be an impromptu meeting called for the purpose of exploring ways and means of organizing an effective Local 10 political committee.

"The Chairman then asked if there would be any objection to the attendance of the B members at this [fol. 172] meeting giving them voice but no vote. Hearing no objection, such will be the order.

"As the first order of business he called upon Brother Mike Johnson, our legislative representative, to bring us up to date on the political scene. He gave a detailed report of the Legislature in Sacramento, citing the Rees-Doyle Welfare Bill as one of the examples wherein the ILWU was very effective in curbing this bad legislation on committee hearings for the time being.

"On the Washington scene, he said we are still concerned with the Forand Bill which would give medical

coverage to the pensioners and we hoped to have it passed as well as a good civil rights measure.

"He also reported on the Kennedy-Landrum-Griffin Bill.

"In the coming elections we are only going to support candidates with good labor records. He urged all the members to write letters in their own hand to their representatives to let them know how they feel about some of the pending legislation. After answering many questions, he urged us to work for labor unity within the community so that we can become an effective force for good legislation.

"Chairman Erkkila thanked our Legislative Representative [fol. 173] for an inspiring report.

"After a good round table discussion which included all phases of political strategy it was:

"Moved, seconded and carried to reactivate our legislative sub-committee and urged all the members of Local 10 to participate to help formulate a sound political program.

"The Chairman informed the committee that the next meeting would be Wednesday, April 13, 1960 and all the members would be notified."

When it says Brother Mike Johnson making that report, "our Legislative Representative", was he a representative of Local 10?

A. He is a representative of all the Northern California locals in Sacramento on state legislation.

Q. You means he goes to Sacramento and represents the interests of the union; is that it?

A. That's correct.

Q. Is that sometimes called lobbying?

A. A little bit.

Q. Then I see the next meeting of the Legislative Committee is April 13, 1960, with Archie Brown present and you, Mr. Rohatch, are shown to be presiding.

"The minutes of last meeting of March 30 adopted as read.

[fols. 174-175] "Communications regarding the Rees-

Doyle Bill which was defeated in committee was read for information.

[fol. 176] Mr. Gladstein:

"After a general discussion of all aspects of political strategy, the following recommendations were referred to the Executive Board and the membership for concurrence.

✓ "Political Action.

✓ "1. That we support the position the International Executive Board has taken on the Kennedy-Landrum-[fol. 177] Griffin Bill."

These are from the minutes of April 13, 1960, Your Honor.

"2. That we ask either Mike Johnson or Henry Schmidt to attend our next meeting to bring us up to date on the political plans of the ILWU Council.

"3. That we help sponsor a Citizen's Conference in the Fourth Congressional District in connection with the coming elections and that we have a meeting of all ILWU Legislative Committees in this area to decide what groups and organizations to involve in a Citizen's Conference in the Fourth Congressional District."

From the minutes of April 28, 1960, concurred in in June 1960 at a membership meeting, a meeting at which Archie Brown was present. I see no motions referring to him personally. With the Court's permission I will read a short passage indicating a portion of the business done.

"As the first order of business the Chairman called upon Mr. Hale, physiologist from the Department of Engineering at the University of California, who is conducting a survey to measure the expended energy of longshoremen and other physical aspects as it relates to our work, and he addressed the Board on that subject."

The minutes of May 12th, 1960, concurred in the follow- [fol. 178] ing month by the membership, about 25 present, Archie Brown shown as present. There is a piece of business relating to Mr. Brown which goes as follows—this was chaired by President Erkkila:

“As the first order of business the Chairman introduced Terry Francois, attorney and prominent member of the NAACP, who gave the Board full information on the efforts the organization is now doing to win public support for their program to bring to an end the segregation that is now going on in the South. He also asked for support on the policy they are now pursuing in San Francisco and New York, namely, the picketing of the stores that are members of the same organizations that are discriminating against them in the South.

“Moved by Bertani, seconded and carried, that this Local participate in the picket line with the NAACP to support them in the sit-in policy that is now going on in the South and that we participate in the conference which is being called by the NAACP here. Also, that this action is to be publicized in the union bulletin.

“The Chairman thanked Terry Francois for appearing before the Board and then excused him.

“On the suggestion of the Chairman, Brothers Jack [fol. 179] Hogan, Archie Brown and Albert Bertani were elected as a sub-committee to help formulate a program which will meet with the approval of the NAACP.”

Later in the proceedings the minutes show:

“Motion by Bertani, seconded, to adopt the officers’ report which covers the manning scale on the new van operation for below decks on the Hawaiian Citizen.”

Q. That Hawaiian Citizen would be the name of a vessel, I assume.

A. That’s right, a Matson ship.

Mr. Gladstein: (Reading):

"Amendment by Brown that the officers be guided by the following:

"1. That the agreement which we have pertaining to the van operation on deck shall be the same as present manning scale.

"2. That we insist on carrying through the original understanding of training crane drivers for these jobs.

"Vote on the amendment carried. Vote on the motion carried."

On the next page:

"A special request was made by Brother Archie Brown to set the regular order of business aside for a moment so that he could present a resolution on the [fol. 180] Un-American Activities Committee."

And that, I think, is the resolution which was read by Mr. Poole, if I am not mistaken. A copy of it is attached.

In the meeting of May 26, 1960, concurred in by the membership June 6, 1960, it appears that Mr. Brown was present together with some 20 or 25 others, and on page 2, a motion was made by Brown, seconded and carried:

"That we instruct the Labor Relations Committee to take up the question of registration of the six Hawaiian brothers who are working on the floor here."

Minutes of June 9, 1960, concurred in by the membership on June 20th, Mr. Brown and some 15 or 20 others present—more than 15—at the bottom of page 1:

"Recommendation as follows from the Executive Board Sub-committee on joint action with the NAACP boycott."

That was the committee to which the minutes referred which I read a moment ago, that had three men on it, Bertani, Brown and a third person.

The Witness: Previous minutes; that's correct.

Mr. Gladstein: "Recommendations as follows from that committee:

"These proposals are made by your Sub-Committee in response to an appeal made by the President of the San Francisco Chapter of the National Association [fol. 181] for the Advancement of Colored People, Terry Francois, to your Executive Committee:

"1. That the Sub-committee be enlarged to at least 15 people drawn from both sides of the Bay and also from Marin and San Mateo Counties.

"2. That our union make the necessary arrangements with several other unions for the purpose of taking over one of the evenings as Union Night.

"3. That we undertake the distribution of several thousand boycott leaflets.

"4. We obtain volunteers from our union membership to go to other unions and organizations to speak on the boycott campaign and its meaning.

"5. To educate our membership on the importance of the boycott through speakers at the meetings and through the use of the bulletin.

"Moved, seconded and carried to concur."

And the minutes now of June 23, 1960 of the Executive Board which were concurred in by the membership in August, a meeting showing Mr. Brown present and Mr. Erkkila presiding. There is a report of the boycott sub-committee which was appointed by the Executive Board, and the chairman of that committee, Robert Marshall, a report which is attached here.

In the attachment to those minutes there is a communication from the March on the Conventions Movement for [fol. 182] From Now, inviting the Board to attend a meeting at which A. Philip Randolph, President of the Brotherhood of Sleeping Car Porters, and Vice-President of the AFL-CIO, and Reverend Martin Luther King would be speaking.

Q. Were delegates or representatives sent to attend that meeting?

A. Yes, sir.

Q. And then a call from some organization called March on the Conventions Movement for Freedom Now; minutes of the Boycott Committee.

Roll call shows Ronald Reino Erkkila, James Kearney, Robert Marshall, Tom Lupher, Tony Broussard, Lorain Stoneham, Dave Adrian, Karl Yoneda, Archie Brown, Jack Hogan and J. B. Westbrook present.

"Moved, seconded and carried that Brother Robert Marshall be elected chairman pro tem.

"Moved, seconded and carried Brother Tom Lupher be elected secretary pro tem.

"Moved, seconded and carried that the question of a permanent name for the Committee and its long-range aims be laid over to the next meeting.

"A discussion of the Executive Board's '5-Point' program was held.

"Moved, seconded and carried that an invitational [fol. 183] letter and copy of minutes be sent to brothers who might be interested in working on the committee so that the committee can be enlarged.

"Moved, seconded and carried that Local 6"—

that is a sister union in which men and women who perform warehouse work—

The Witness: That's correct.

Mr. Gladstein: (Reading):

"... that Local 6 ILWU's Community Relations Committee be contacted in order to plan a union night on NAACP picket line at Woolworth's and Kress's.

"Moved, seconded and carried that authorized Local 10 members should approach other unions which would be interested in participating in such a picket line.

"These contacts are to be made — coordination with the appropriate NAACP personnel.

"Moved, seconded and carried that Brother Jack Hogan attend the NAACP's Boycott Committee on June 21st as our representative."

Also a motion that the Committee plan leaflet distribution.

"A communication from the March of Dimes; from the United Bay Area Crusade requesting donations."

Q. Is that frequently a part of the work of your Executive Board: to pass upon and make recommendations in such matters?

A. Originally it was. Now it goes through the Board of Trustees.

Q. That is something that has changed since the 1959-60 period, you mean?

A. That's correct.

Mr. Gladstein: And a report on the Joint Warehouse Coordinating Committee—IBT-ILWU Joint Warehouse Committee.

Q. What is that committee, Mr. Rohatch?

A. That is the International Brotherhood of Teamsters Union.

Q. And they and the ILWU have a joint committee on warehouse?

A. That's correct.

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[fol. 184] Mr. Gladstein: I want to turn from these minutes for a moment, Your Honor, and go to something else, if we may.

Q. Mr. Rohatch, what is the practice, if there has been one, and particularly during the indictment period—we are talking about October 1959 to May 1961—what was the practice then of, when the union received on any important subject a communication from the president of the International Union, Mr. Bridges?

A. Usually a letter of that type is directed to the Executive Board for action and recommendation, to discuss and then make recommendations to the membership.

Q. Whether to concur or not?

A. That's correct.

Q. That word is used all the time.

A. That's right—concur, reject or amend.

Q. And state from your recollection if it is true that during the period to which I refer, the Executive Board did receive a communication from Mr. Bridges in reference to this law known as the Kennedy-Landrum-Griffin law, and bearing on the same subject that Mr. Poole read into the record about the position of the union on that.

A. Mm-mmm.

Q. Did?

A. Yes.

[fols. 185-186] Q. These were clipped together and I inadvertently separated one page from the other. I have shown this to counsel, Mr. Rohatch. Tell the jury, if you will, if you recognize those two pages as true and correct copies of the communication received by and treated at your Executive Board meeting?

A. Correct. The first one is directed to All ILWU Locals, from Harry Bridges, the second one is to Normal Leonard, Mr. Leonard of the firm of Gladstein, Andersen, Leonard & Sibbett, from Luther A. Houston, Director of Public Information, Department of Justice, Washington, D.C.

Q. And your recollection is those were received, read and acted on by the Board at or about the dates borne there?

A. Pretty sure they were, yes. These are of extreme importance; I am pretty sure they were acted on.

Mr. Gladstein: I offer these in evidence, if Your Honor please.

Mr. Poole: Just a moment. I would like to see the reference made to the Board.

[fols. 187-191] Q. Mention has been made and copy has been received of a publication called the Dispatcher. What is that?

A. The Dispatcher is a paper that's put out by the International Union that goes to all members.

Q. Goes to each and every member, right?

A. That's correct.

[fol. 192] The Court: Ladies and gentlemen of the jury, that isn't the problem before us at all, as to whether there was any action required or not required by the union itself in this matter at all. The charge does not concern the union as such; it concerns the defendant, as you have been told, Mr. Brown. That's the only issue we have before us, and the only complete issue. I was trying to understand how this may or may not affect Mr. Brown in the matter. Apparently it doesn't at this stage, at least, that I can see.

Mark them for identification and we will have them available. If they prove to be relevant for some purpose, I will admit them in the future, but now I am denying your [fol. 193] motion.

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Mr. Gladstein: No. Defendant's B for identification only, that portion which deals with the subject that I am talking about, which is found on page 1 of the issue of that copy of The Dispatcher constituting the printed material on the left-hand column. Does Your Honor wish to take a look at that before ruling?

The Court: Yes, I do. I haven't seen that at all. [fol. 194] (Examining.) Yes. Well, this refers directly to that correspondence.

Mr. Gladstein: Yes, it does.

The Court: That is a news item. Yes, all right, same ruling.

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Mr. Gladstein: Q. Now, at my request, Mr. Rohatch, were the union records checked to see in what year and on what date Mr. Brown become a registered longshoreman in San Francisco?

A. He was first registered in 19—the latter part of '44, I believe.

Q. Well, if I suggest that the record shows January 1944?

A. January, yes, that's possible.

.

[fol. 195] Q. Did the union register Mr. Brown—

A. Yes.

Q. —as a longshoreman in January 1944, following a decision and award by an arbitrator, Professor Alexander M. Kidd,—

Mr. Poole: To which I will object. I am sorry, are you through with your question?

Mr. Gladstein: Not yet.

Mr. Poole: I beg your pardon.

Mr. Gladstein: Q. —directing that he be so registered?

The Court: Now I will sustain the objection. The fact of his registration is sufficient, I think, for our purposes.

[fol. 196] Mr. Gladstein: Q. Mr. Rohatch, this bulletin that's in evidence, February 12, 1960, it and any bulletin, weekly bulletins that's put out, tell us what the practice was that was followed with regard to any editing or controls, if any existed, over the person who wrote the material that went into the bulletin.

A. Well, first of all, the man that writes the Bulletin, the member of the Publicity Committee, he comes in in the morning and does the writing. When he is finished with the Bulletin, this, his copy, which usually is in longhand, is given to the girl and she makes a dummy copy, what they call a practice copy, and that is given to the president of the [fol. 197] union. The president must read all copies of the Bulletin and he can veto any section of that Bulletin that he feels is not in the interests of the union. He is what you call the editor in chief. In other words, he can veto any part of that Bulletin.

Q. And it is fair to say that each and every Bulletin in its mimeographed form, such as the one that's in evidence here as No. 6, must first receive the approval of the president before it can be printed?

A. Or the vice-president, in his absence.

Q. Mr. Rohatch, I have had compiled here what I am told constitutes 32 Bulletins which bear on their face somewhere—yes, bear at the end of reference to the fact that Archie Brown was a member of the Publicity Committee that prepared the text of these, and these, together with the one that is in evidence, constitute all of the Bulletins put out written by Mr. Brown during the period of the indictment.

I will ask if you can examine them quickly and tell me if that appears to be so.

A. That's correct.

OFFER IN EVIDENCE AND OBJECTION THERETO

Mr. Gladstein: Your Honor, I offer these in evidence, and lest anybody get worried, I have no intention of reading from them unless there is something later on that is called to my attention.

Mr. Poole: I will object to them.

[fols. 198-199] Mr. Gladstein: But as going to establish not just one Bulletin but everything said and done and written by Mr. Brown during the indictment period in that Bulletin.

Mr. Poole: Well, Your Honor, I will object to this, and the defense—I do not see how what everything the defendant said and did has any relevance to the issues in this case.

[fol. 200] The Court: All right, mark them in evidence. I will allow them.

The Clerk: Defendant's Exhibit C in evidence.

(32 copies of the Bulletin were received in evidence as Defendant's Exhibit C.)

[fols. 201-203] Q. Is the testimony that you gave concerning Bulletin Prosecution Exhibit 6 that it was reviewed and had to be reviewed by the president before it could be published? Is that testimony equally applicable to all the Bulletins?

A. No Bulletin is published without the president's okay, or the vice-president's, in his absence, okay.

Q. I read to you yesterday a passage from the constitution of your union saying that there should be—in effect; I am paraphrasing—no discrimination on account of race, creed, color, political beliefs, religion and so on. Is there any comparable provision contained in the collective

bargaining agreements between the unions and the employers?

Mr. Poole: To which I will object on the grounds, Your Honor, that it is irrelevant and immaterial and without the scope of the issues of this case.

The Court: That's right. I will sustain the objection.

[fol. 204] Mr. Gladstein: Q. During this indictment period, that is, between October 1959 and May 1961, did your union receive official commendation from the City of San Francisco and from the Assembly and Senate of the State of California for the—

Mr. Poole: To which I am going to object.

Mr. Gladstein: Q. —for the contracts which your union had entered into, which include the passages to which I made reference?

Mr. Poole: Your Honor, I am going to object to this. [fol. 205] First of all, Mr. Gladstein knows this is not the way to put a question. He asked the witness and puts before the jury the subject matter which, if the witness is allowed to answer, is covered. I am going to object to it as being irrelevant and outside the scope of the indictment.

The Court: I think so.

Mr. Poole: And I ask that the jury be admonished to disregard any inferences from it.

The Court: I think, Mr. Gladstein, this is all irrelevant.

Mr. Gladstein: What?

The Court: The citations you may have received is not a relevant issue here.

Mr. Gladstein: Your Honor, I certainly am entitled to my theory of defense in this case.

The Court: Certainly.

Mr. Gladstein: I put it in in writing.

Mark that for identification, if you will, please.

The Clerk: This is Defendant's Exhibit D for identification.

(Framed document was marked as Defendant's Exhibit D for identification.)

The Clerk: This is Defendant's Exhibit E for identification.

(Another framed document marked Defendant's Exhibit E for identification.)

[fols. 206-207a] Mr. Gladstein: Q. Mr. Rohatch, you are familiar with the contents of and the documents contained in those two frames that are marked for identification, are you?

Mr. Poole: Your Honor—

Mr. Gladstein: I am only asking if he is familiar. I am trying to lay a foundation.

Mr. Poole: I won't object to that.

The Witness: Yes, sir.

Mr. Gladstein: Q. And is it true that they were received by the union on or about the dates they bear?

Mr. Poole: Just a moment. Now, Your Honor, I am going to object to any further reference to this.

Mr. Gladstein: I have not yet given up the hope that in the absence of the jury in a discussion of the law this may be received by the Court, but I don't want to keep Mr. Rohatch unnecessarily.

The Court: I understand.

Mr. Gladstein: That is the only purpose, to establish a foundation.

The Court: You have no objection as to foundation. Let's consider them identified by Mr. Rohatch foundationwise.

Mr. Poole: Yes, foundationwise.

The Court: And at a later argument we can determine the relevancy. That is understood?

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[fol. 208] The Court: Mr. Poole, call your next witness.

Mrs. WILLIAM D. DAVIS, called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your full name, your occupation, if any, and your address to the Court and jury.

The Witness: Mr name is Mrs. William D. Davis and I live in San Mateo, California, and my occupation is a housewife.

Direct examination.

By Mr. Poole:

Q. Mrs. Davis, have you ever seen the defendant, Archie Brown?

A. I see him, yes, and I have seen him before, yes.

Q. Let me direct to your attention the date of May 23rd, 1960. Did you have occasion on that date to be in Palo Alto, California?

A. Yes, I did.

Q. And particularly directing your attention to a meeting which took place on the evening of that day, did you attend such a meeting?

A. Yes.

Q. Where was it?

[fol. 209] A. Well, it was at Stanford University at the Memorial Auditorium.

Q. And was this a public meeting?

A. Yes, it was public; open to everyone.

Q. Beg your pardon?

A. Yes. By "public," you mean open?

Q. Yes.

A. Yes.

Q. Public. There were other people present, then?

A. Oh, yes.

Q. Now was Mr. Brown present at that meeting?

A. Yes, he was.

Q. And was there a speaker at that meeting?

A. Mr. Brown was the speaker.

Q. He was the speaker. At the conclusion of his speaking, did you have conversation with Mr. Brown?

A. At the conclusion? No, I did not.

Q. During his speaking, did you?

A. During the question and answer period, I spoke to Mr. Brown.

Q. There was a question and answer period which followed then upon the formal speaking, is that correct?

A. Yes.

Q. And during this question and answer period, and this is the manner in which you had occasion to talk to him?

[fol. 210] A. Yes.

Q. Did you put a—or ask him a question?

A. Yes, I did.

Q. Will you tell us what the question was that you asked him?

A. Well, I posed this question to him. I said, "Are you a Communist? And if so, is it not true that as such, your orders come to you from the Kremlin?"

Q. Was there an answer made to your question by Mr. Brown?

A. Yes, Mr. Brown answered the question.

Q. What was his answer?

A. His answer was, "I have been a member of the Communist Party for 25 years and I am now a member of the Communist Party."

Q. Now was this question and answer period also conducted in front of this same audience?

A. Yes.

Q. Approximately how many people were present, as you recall?

A. Well, I would guess approximately 200.

Q. I see. This was on the 23rd of May, 1960, is that correct?

A. Yes, sir.

[fol. 211] Cross-examination.

By Mr. Gladstein:

Q. Now, Mrs. Davis, how did you learn of this meeting?

A. How did I learn of it?

Q. Yes.

A. Well, kind of like, sort of a fluke. My husband came home on the train and I picked him up at the train and I

had been ill, and I went to the train to pick him up—it was very late in the afternoon, almost early evening. And when he got off the train, he said that he had seen an article in the News-Call-Bulletin that Archie Brown was to speak at Stanford and asked me if I wanted to go.

[fol. 212] Mr. Gladstein: Q. All I want to know is, this was publicized as a meeting at which Archie Brown would speak. That's true, isn't it?

A. As I recall, it was a news article with the information that Mr. Brown was going to speak.

Q. Was going to speak. All right. So you decided you wanted to go. And where was it held?

A. It was held at Stanford.

[fol. 213] On the campus?

A. It was in the Memorial Auditorium on the campus, yes.

Q. And how did one gain admission?

A. You just walked in.

Q. Just walked in. And do you know under whose auspices the meeting was held?

A. Well, I believe it was—

Q. Do you know, ma'am?

A. Pardon?

Q. Do you know?

A. The political student group there.

Q. On the campus?

A. Yes.

Q. Do you know the name of the organizations?

A. I'm not sure, but I believe that it's a political union, something to that effect, student organization.

Q. Do you know anything at all about the organization as one of those on the campus, or do you know anything about it?

A. No, no, I don't.

Q. Had you ever seen Mr. Brown before?

A. No, not to my recollection.

Q. Or since?

A. No.

Q. This was the only occasion when you heard him and [fol. 214] spoke to him?

A. Yes.

Q. Now did your husband go with you?

A. Yes.

Q. And how long were you at the meeting?

A. Well, we stayed—we arrived early because we went directly from the train station, and then we had a little wait before the program began. Then immediately following that, we left. I understand that the meeting didn't—

Q. Excuse me for interrupting. I just asked you how long was the meeting, or if you don't know, how long were you there?

A. Oh. Well, I can say approximately two hours.

Q. You were there about two hours?

A. Yes, approximately. Perhaps two and a half.

Q. All right. And were there any speakers other than Mr. Brown?

A. There—he was introduced by a young man, I believe his name was White.

Q. A student, you mean?

A. A student introduced him.

Q. Were there any members of the faculty there?

A. Well, I don't know any of the members of the faculty so I wouldn't know.

Q. Was there a stage or a raised platform on which the—

[fol. 215] A. Yes, there was a stage.

Q. —chairman, the speaker or speakers, or others, were gathered there? Is that so?

A. Well, no, I didn't—none of the faculty members were introduced, to my recollection.

Q. You don't know whether they were on the stage or in the audience or at all, do you?

A. No, I wouldn't know about the faculty members if I saw them.

Q. All right. Now after being introduced, I take it Mr. Brown made a speech of some kind, right?

A. Yes, he did.

Q. And are we to understand that thereafter there were questions solicited from the audience?

A. Yes.

Q. And these are questions to which Mr. Brown gave answers in the presence of all?

A. Yes.

Q. And are we to understand that the question that you put to him was asked during that question and answer period?

A. Yes.

Q. And in the presence of some 200 or so people he made that mark?

Yes.

Q. That you have testified to?

[fol. 216] A. Yes.

Q. What did you do after you heard this?

A. I sat down.

Q. You sat down. But I mean, did you tell anybody about this after May the 23rd?

A. Did I tell anyone about it?

Q. Yes.

A. I might have.

Q. Well, don't you know?

A. Yes, yes, I did.

Q. And who was the first person?

A. My folks. We had dinner with them.

[fol. 217] Q. And when?

A. Oh, I guess it was a couple of days later.

Q. And what I gather is that you told your folks a couple of days later that you heard Mr. Brown say in an answer to your question that he was and had been a member of the Communist Party; is that right?

A. Um hum.

Q. All right. Anybody else?

A. I'm not sure.

Q. Well, think hard, please, Mrs. Davis. Between May 23rd of 1960 and today, isn't there someone else besides your folks to whom you told this, that you heard Mr. Brown say—

A. Anyone else? Do you mean—

Q. Anyone.

A. Among friends or what?

Q. Anybody?

A. Well, I suppose that in. . . . I have—I can't say who or anything—in—perhaps when the subject came up of that meeting at Stanford.

Q. Did it come up subsequently anywhere that you can tell us about?

A. No, no particular instance.

Q. Did you write it down with the question and the answer?

A. Yes.

[fol. 218] Q. When?

A. At the time.

Q. And what did you do with it?

A. I have it.

Q. Have you always had it?

A. Yes.

Q. You haven't given it to anybody?

A. No.

Q. No one else has been shown it?

A. Yes.

Q. Who?

A. Mr. Vincent has seen it and Mr. Poole has seen it.

Q. Well, when did you first show it to either of those gentlemen?

A. It was about a week ago.

Q. That's the first time?

A. Well, Mr. Poole saw it for the first time yesterday.

Q. Mr. Vincent a week ago?

A. About a week ago.

Q. And prior to a week ago, what you had written down had not been shown to anybody?

A. No. My husband—my husband saw it.

Q. Your husband. But nobody else?

A. No.

Q. What does your husband do?

[fol. 219] A. Pardon?

Q. What does your husband do?

A. He's in business.

Q. I mean, he is not connected with the Government, is he?

A. The Government? Do you mean the—

Q. The Government of the United States?

A. Well, if you would—he was in the—

Q. No, no. Mrs.—

A. —Armed Forces for 46 months during the war. That would be his only——

Q. Connection with the Government?

A. —connection with the Government.

Q. What I have in mind is, is he connected in any way with the office of the United States Attorney or the Attorney General or——

A. No, sir.

Q. —nothing like that?

A. No, sir.

Q. So until a week ago, your husband was the only person to whom you had showed what you had written as a record of what you asked Mr. Brown and what he said in answer on May 23rd, 1960, right?

A. That's correct.

Q. Did you go to this meeting, Mrs. Davis, at the request of anyone——

[fol. 220] A. No.

Q. Excuse me until I finish, because the reporter has to——

A. Pardon?

Q. Excuse me until I finish the question. Would you mind?

A. I am sorry.

Q. Did you go to the meeting at the request of anyone connected with any branch of the United States Government?

A. No.

Q. Or any other person at all?

A. No.

Q. All right. Now where was it that you wrote this down, this question and answer?

A. Well, I happened to have with me a doctor's bill——

Q. And so you wrote it down on the doctor's bill?

A. Wrote it down on the doctor's bill.

Q. Right there at that time?

A. Yes.

Q. In shorthand or writing or what?

A. In writing.

Q. And then outside of showing it to your husband, you put it away somewhere and you have kept it for almost two years, is that right?

A. Yes.

Q. Now did you send any letter to anybody or any [fol. 221] communication to anybody connected with government or anybody else—anything else—concerning this?

A. Yes, I did.

Q. To whom?

A. To Mr. Thau.

Q. Who?

A. Mr. Thau.

Q. When did you do that?

A. Well, it was about a year ago.

Q. It was what?

A. It was approximately a year ago.

Q. Was it when you read perhaps in the newspapers that Mr. Brown had been indicted?

A. No.

Q. Before or after?

A. I'm not sure.

Q. Do you have a copy of what you wrote to him?

A. Yes.

Q. Did you know Mr. Thau at the time you were writing it to him?

A. Yes, I had met him.

Q. Had you met him in connection with any work concerning the FBI?

A. Yes.

Q. You knew him to be an agent of the FBI?

[fol. 222] A. I hadn't previously, no, until he came to see me one day.

Q. About Archie Brown?

A. Yes.

Q. I see. Did he seem to know at that time that you had been at the meeting?

A. Yes, he did.

Q. And would you tell me when that was?

A. Yes. I am trying to remember.

Q. Do the best you can.

A. This was following, not too long following the speech at Stanford. By "not too long", I mean—

Q. We are now in March of 1962, and you have testified here this afternoon concerning a public meeting on May

23, 1960, almost two years ago. I realize that you can't pinpoint this, but give us the best recollection that you have, as to when it was that Mr. Thau came to you.

A. Well, it was, I would say, approximately two weeks, perhaps, or maybe a little sooner than that.

Q. After May 23rd?

A. After May 23rd. He asked me if I had been the person that had asked that question, and I said yes.

[fol. 223] Q. You hadn't known him up to that time?

A. No.

Q. I understand you then to say that when Mr. Thau came, and I suppose he introduced himself and showed his credentials?

A. Yes.

Q. And then he said that he understood that you had asked the certain question?

A. Yes.

Q. And did he tell you what his understanding was of the question that he understood you to say, or to ask?

A. No, he asked me if I had been there, and I said yes, I had, and so he said, "Well, do you recall the question?"

Q. And you said you did?

A. And I said, "Yes, I do remember."

Q. And then he wanted to know if you recalled the answer?

A. He wanted to know what it was.

Q. He wanted to know what you recalled as to the answer?

A. Yes.

Q. And you said yes, you did?

A. Yes.

Q. And you told him the answer?

A. Um hum.

Q. But you did not show him or tell him that you had anything on which you had written the question and the answer, is that right?

[fol. 224] A. No, because I lost the notes and I told him at that time I took notes and I had the notes; but I didn't know where they were and I had—

Q. You have, however, subsequently found them, at a date how long ago?

A. Well, I located them, oh, about—

Q. A week ago?

A. No, no. I located the notes, I believe it was when we moved. Now, let's see. We moved in September. So around that time. But I put them in a folder and then we moved. At the time we moved, I found them. Then I put them in a folder, and then we moved and I lost them again.

Q. Are you telling us that you moved once or twice in this period?

A. No, we moved in September.

Q. In September of which year?

A. Of this last year, 1961.

Q. And it was at that time that you found them?

A. Yes.

Q. But having found them, you didn't send the notes to Mr. Thau or tell him anything about it?

A. No. I didn't hear from Mr. Thau at all after that.

Q. Did Mr. Thau ask you to, when he saw you—I gather then he only saw you once?

A. You mean in the whole time?

[fol. 225] Q. Yes,

A. No. Let's see. How many times have I seen him?

Q. Yes, how many times?

A. I saw him following this speech and then I saw him briefly about a year ago, very briefly. We didn't talk.

Q. Didn't discuss the subject of your testimony here at all?

A. No, no, we didn't.

Q. All right, go ahead. And then again?

A. Then again—let's see. A week ago Saturday night.

Q. A week ago Saturday night?

A. Well, I didn't know. Let's see. It was a week ago last Saturday. He came to the house and he had asked me if I had found the notes, and I said yes, I had, but I still had to look for them. I had misplaced them. But I found them, I found them.

Q. You had misplaced them again?

A. Yes.

Q. A week ago Saturday night when Mr.—well, no, no. Wait. Wait, ma'am, please.

A week ago Saturday night when he came to see you, you again—you said he asked you had you found the notes and you said, "I have, but now I have misplaced them again," is that right?

A. No, I had found them. I found them.

[fol. 226] Q. Well, so you had them?

A. Yes.

Q. Now you didn't show them to him?

A. I don't recall whether I did or not.

Q. He didn't ask, he didn't ask to have them shown to him?

A. I believe I did have them then.

Q. You have already told us now that you believe that you had them. My question is: Did you show those notes to Mr. Thau or did he ask you to show them to him?

.

The Witness: Yes, last Saturday he did a week ago last Saturday.

Mr. Gladstein: Q. So then you were mistaken in your earlier testimony when you said that no one has seen these notes other than your husband, except Mr. Poole a day or two ago, and Mr. Vincent about a week ago? That's right?

A. Well, I thought you were referring to—you were [fol. 227] talking about immediately following, if you will recall, immediately following the speech.

Q. Oh?

A. Yes.

.

Q. Mrs. Davis, were you a witness before the Grand Jury in this matter?

A. The Grand Jury? No, this is the first time I have been.

Q. And when were you first asked to be a witness in the case?

A. Mr. Thau, the first time I met him, asked me if I would be willing to, at some future date, be a witness, and I said yes, I would if they thought that was necessary.

[fol. 228] Q. All right then, let's see. Mr. Thau asked you within a week or thereabouts after May 23, 1960 whether you would be willing to be a witness and you said "yes"; right?

A. Yes.

Q. But you weren't thereafter called before the Grand

Jury, and when did you first learn that you were going to be called as a witness in fact?

A. That was when Mr. Thau came to the house.

Q. A week ago Saturday?

A. A week ago Saturday.

Q. A week ago Saturday. At any time were you asked to provide a written statement to Mr. Thau or Mr. Vincent, Mr. Poole or anybody else?

A. No.

Q. Excuse me. Of what your testimony would be?

A. No.

Q. Were you at any time asked to dictate to a stenographer the substance of your testimony?

A. No.

Q. Were you shown at any time a statement of what it would be expected that you would testify to?

A. No.

Q. And you have never signed a statement of any kind for the Government?

A. Well—

[fol. 229] Q. Have you signed a statement of any kind for the Government as to what your testimony would be?

A. No, not in regard to what the testimony would be. This is what I started to tell you before. Would you like for me to—

Q. Just respond to my questions because we are only concerned with your testimony; there may be other extraneous matters that are just not part of the case. What I am trying to find out is whether at any time before you took the witness stand here today, this afternoon, you ever signed any statement which was either dictated by you or anybody else and written up for your perusal and approval setting forth in essence what you would testify to? Did you?

A. Not as testimony as such, but voluntarily. I did, after seeing Mr. Thau originally, voluntarily I wrote up briefly what had happened and sent it to him. He hadn't requested it but I did, so this may be what you mean.

Q. Have you ever seen that again?

A. I have a copy of it; I have never seen the original, no.

Q. You mean Mr. Thau, Mr. Poole and Mr. Vincent have

never reviewed that letter or statement from you with you before you took the witness stand?

A. They asked me if I had a copy of it, which I have, and I know what was in it.

Q. When did they ask you that?

[fol. 230] A. Well, when I saw Mr. Vincent.

Q. Last week?

A. Yes.

Q. Did you make any notes at the time of the meeting of any other question or answer?

A. Yes, I did.

Q. These are all in the notes that you took?

A. Yes.

Q. You did this of your own volition and at nobody's request?

A. That is correct.

Q. Now, it is perfectly clear that this was a public meeting?

A. Yes.

Q. It was open to anybody and everybody, is that right?

A. Yes.

Q. How big a seating capacity did it have, approximately?

A. Approximately 600—500 or 600.

Q. And you did directly ask the question, "Are you and have you been a Communist Party member?"

A. Yes.

Q. And he didn't know you and you didn't know him at that time, is that right?

A. Yes.

Q. And you did hear him say, in the presence of all those [fol. 231] people, "I am and I have been"; right?

A. Yes.

GUY O. WATHEN, called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your full name, your occupation and address to the Court and jury.

The Witness: Guy O. Wathen, W-a-t-h-e-n, 450 Bryan [fol. 232] Street, Palo Alto, California; occupation, police captain.

Direct examination.

By Mr. Poole:

Q. Captain, you are an officer of the Palo Alto Police Department?

A. I am.

Q. With the rank of captain?

A. That is correct.

Q. How long have you been a police officer?

A. Twenty years.

Q. Do you know the defendant Archie Brown?

A. I do.

Q. Do you see him in the courtroom?

A. I do.

Q. Will you identify him for the record?

A. The gentleman sitting at the end of the table.

Mr. Poole: Let the record indicate that he is indicating the defendant.

The Court: Yes.

Mr. Poole: Q. Let me call to your attention, Captain, the date of May 23, 1960. Did you on that day have occasion to go to the Memorial Auditorium in Palo Alto, California?

A. I went to the Stanford Memorial Auditorium located on the campus—Stanford campus, yes.

Q. And was there a meeting of some sort taking place [fol. 233] there that day?

A. Yes, a student political meeting.

Q. What time of day was it?

A. Between the hours of 7:00 and 10:00 p.m. at night.

Q. You also then went to the meeting?

A. That is correct.

Q. Was there a speaker?

A. There was, yes.

Q. Who was the speaker?

A. Mr. Archie Brown.

Q. Was he introduced by someone?

A. Yes, he was.

Q. Do you recall whether that person who introduced him was or was not a student?

A. I believe he was a student. I believe his name was White, and so far as I could ascertain, he was the M.C. for that particular evening.

Q. You mean he presided?

A. He presided over this political meeting.

Q. What was the general subject matter of that meeting that evening?

A. It was advertised in the Palo Alto Times as to information or some information with Mr. Brown as the speaker on the recent House Subcommittee on Un-American Activities session in San Francisco.

[fol. 234] Q. Did Mr. Brown speak?

A. He did, yes.

Q. And following the speaking, was there a question and answer period?

A. Yes, there was.

Q. You were still present at that time?

A. I was, yes.

A. And do you recall that a question was asked of Mr. Brown by some person which sought from Mr. Brown whether he was or had been a member of the Communist Party?

A. Yes.

Q. Did you hear the question?

A. I did, yes.

Q. Will you tell us to the best of your recollection what the question was?

A. The question was asked of the audience whether or not he, Mr. Brown, was then or had been a member of the Communist Party.

Q. And the answer?

A. Mr. Brown's answer at that particular time was that he had been asked this same question at the House Subcommittee Un-American Activities session in San Fran-

cisco; that he had refused to answer at that particular time because he did not feel it was a legally-constituted body; that he would tell them and did tell them at that time he was a member of the Communist Party and had been [fol. 235] such for 25 years.

Q. That he did not tell them but would tell the audience?

A. That's correct.

Q. His present audience.

Mr. Poole: Q. In other words, to be clear, Mr. Brown said, in response to the question put to him from the floor of the meeting on May 23rd, that he had been asked by the Sub-committee of the House Un-American Activities Committee concerning his membership in the Communist Party but he had refused to answer the question at that time.

A. That's correct.

Q. Because he did not believe it to be a legally-constituted body?

A. That is correct.

Q. But that he would answer it for the benefit of his questioner at the May 23rd meeting.

A. He would and did, yes.

Q. And did you at that time know the person who asked the question?

A. No, I did not, no.

Q. In the auditorium, where were you seated, Captain? [fol. 236] A. I was seated in the rear facing the stand or the lecturer. I would be on the left rear and the question came from somebody in the right front of the auditorium.

Mr. Poole: I see. Thank you. I have no further questions.

Cross-examination.

By Mr. Gladstein:

Q. Do you know a Mrs. William Davis, sir?

A. I beg your pardon?

Q. Do you know a Mrs. William Davis?

A. No, I don't. I may, but I don't at this time.

Q. Mrs. William Davis was the witness who preceded

you on the stand this afternoon and you have never met that lady?

A. Not to my knowledge, no.

Q. Do you know from whom the question came that you heard on the night of May 23rd, 1960? That was the night, was it?

A. That is correct. I do not. There were approximately 250 to 300 people in the auditorium at that particular time.

Q. You have given us the very best recollection that you have of the questioning and the answers?

A. That is correct.

Q. And you are a man who has been in police work for many years; is that right?

A. Twenty years, plus, yes, sir.

Q. And to some extent I suppose your experience and [fol. 237] your work has trained you to try to memorize things and make notes of them in some precise manner?

A. At times, yes, but this particular question and answer because I was curious.

Q. Yes. Well, I mean in the interests of accuracy as a police officer you try to recall as nearly as possible just what was said.

A. That's correct.

Q. Now, one question: Is it possible, Officer—Captain—is it Captain?

A. Yes.

Q. Is it possible, Captain, that Mr. Brown may have said, when he was asked this question, not that he had been asked by the House Committee on Un-American Activities but that if he had been asked he would not have answered them because he felt they were not a legally-constituted committee? I ask you that because, should it appear in the actual proceedings that he never was asked that question, I am just wondering whether or not it is possible that he said, "Well, if they had asked me, I wouldn't have told them," the reason that you have assigned, "But you, since you ask me and I am under no compulsion to answer, but I want to" and he did. Could that have happened, sir?

A. I gave the answer to the best of my knowledge, to the best of my recollection, and it was as stated.

[fols. 238] Q. It was as you stated. All right. Admission

to that meeting was free and open to everybody and anybody?

A. That is correct.

Q. I don't suppose anybody was keeping a record of what was actually said—nobody was transcribing the questions, answers, speeches or anything else?

A. Not to my knowledge. I was merely there out of curiosity.

Q. And it was a meeting that you saw advertised so that people could know in advance and come there, right?

A. That is correct.

[fol. 239] LULA MAY THOMPSON, called as a witness by the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your full name, your occupation, if any, and your address to the Court and the jury.

The Witness: Lula May Thompson, housewife, Lathrop, California.

Direct examination.

By Mr. Vincent:

Q. Mrs. Thompson, are you a member of the Communist Party?

A. I am.

Q. And what Communist Party are you referring to?

A. The Communist Party, U. S. A.

Q. And can you tell us, please, the circumstances under which you joined the Communist Party, U. S. A.?

A. I joined the Communist Party, U. S. A., at the request of the Federal Bureau of Investigation.

Q. And Mrs. Thompson, do you hold any positions in the Communist Party?

A. Yes, sir, I do.

Q. And would you please tell the Court and jury what positions you hold?

[fol. 240] A. I am a member of the District Committee of Northern California, I am Section Chairman of the

Sacramento-San Joaquin Valley Section, and I am Treasurer of the San Joaquin County Club.

Q. And as of October, 1959, Mrs. Thompson, were you then a member of the Communist Party?

A. Yes, sir, I was.

Q. And did you also hold the positions you have just enumerated?

A. Yes, sir, I did.

Q. Now, Mrs. Thompson, do you know an individual by the name of Archie Brown?

A. Yes, I do.

Q. And do you see that individual in this courtroom today?

A. Yes, he is sitting right there at that table facing me. He is holding a pencil in his hand.

Mr. Vincent: May the record show, Your Honor, that the witness has identified the defendant?

The Court: It may so show.

Mr. Vincent: Q. Now since October, 1959, Mrs. Thompson, have you had any occasion to attend any type of Communist Party function or affair, of any type?

A. Yes, I have.

Q. Would you please tell us what types of affairs or functions you have attended?

[fol. 241] A. I have attended district and national conventions, district committee meetings, section meetings, club meetings, conferences.

Q. Now, directing your attention to the month of November, 1959, did you have occasion to see Archie Brown during that month?

A. Yes, I did.

Q. And what part of the month did you see him?

A. It was on November 21st and 22nd.

Q. And where did you see him?

A. At the first half of the district convention of the Communist Party in Oakland.

Q. And where was that convention held, Mrs. Thompson?

A. It was held in St. George's Hall in Oakland.

Q. And can you tell us approximately how many individuals were present at that convention?

A. There were between 80 and 90 people present.

Q. And in what capacity did you attend that CP Convention?

A. I attended as a member of the District Committee.

Q. And did you participate in any of the activities at that convention?

A. Yes, I did.

Q. And would you please tell us what you did?

A. I was a member of the Arrangements Committee that set up the original arrangements for the convention. I was a [fol. 242] member of the Rules Committee, and I was in charge of credentials and balloting.

Q. Now was there a chairman to the Rules Committee, if you recall?

A. Yes, sir.

Q. And who was the chairman?

A. The defendant; Archie Brown.

Q. Now do you know whether or not Mr. Brown participated in any work or any activity of any kind at this convention?

A. Yes, he did.

Q. And would you please tell us what he did?

A. Well, as chairman of the Rules Committee, he presided over its meetings.

Q. And what was the function of this Rules Committee?

A. To set up the rules of conduct for the convention and to screen the nominees for a delegate to the national convention.

Q. And was any election of any kind held at this convention?

A. Yes, sir.

Q. And what election was held?

A. The election of delegates to the 17th National Convention.

Q. And what 17th national convention are you referring to?

A. The 17th National Convention of the Communist Party, U. S. A.

Q. And can you tell us if there was any basis requirement for a delegate to be nominated and/or elected to this [fol. 243] national convention?

Mr. Gladstein: I am going to object to that as incompetent, irrelevant and immaterial.

The Court: Well, overrule the objection. I think it would be competent.

The Witness: You had to be a member of the Communist Party in good standing with your dues paid up to November the 1st, 1959.

Mr. Vincent: Q. Now can you tell us after this convention, Mrs. Thompson, when is the next occasion, if any, when you saw the defendant, Archie Brown?

A. I saw him again on December 10th through the 13th of 1959.

Q. And what was the occasion at this time when you saw him?

A. This was the 17th National Convention of the Communist Party.

Q. And where was this convention held, please?

A. It was held at the Theresa Hotel, Harlem, New York City.

Q. Now if we may leave that convention for the time being, Mrs. Thompson, can you tell us when you next saw Mr. Brown, if you did?

A. On December 22nd, 1959.

Q. And where did you see him?

A. In the offices of the People's World in San Francisco.

Q. And what was the occasion upon which you saw him?
[fol. 244] A. This was a meeting of the delegates who had attended the National Convention of the Communist Party.

Q. And can you tell us the purpose of this meeting of these delegates?

A. Yes.

Mr. Gladstein: I am going to object to that—

The Court: Just a moment.

Mr. Gladstein: —as incompetent, irrelevant and immaterial.

[fol. 245] Mr. Vincent: Q. Mrs. Thompson, just briefly, please, what occurred at this meeting?

A. The meeting—

Mr. Gladstein: Well, I make the same objection, if Your Honor please.

The Court: Well, what occurred is a proper question, Mr. Gladstein. This is a meeting, and what occurred I will allow.

The Witness: Mickey Lima gave a report on the national convention and there was then discussion of it, of [fol. 246] his report and the delegates' opinions of the national convention.

Q. And when did you next have occasion to see Archie Brown, Mrs. Thompson?

A. On January 9, 1960.

Q. And where did you see him?

A. In the offices of the People's World in San Francisco.

Q. And what was the occasion upon which you saw him this time?

A. This is a meeting of the District Committee of the Communist Party, U. S. A.

Q. Now can you tell us the names of any other members of the District Committee who were present at this meeting?

A. Yes, I can.

Q. And would you please?

A. There was Mickey Lima, Al Richmond, Juanita Wheeler, Archie Brown, Roscoe Proctor, Jimmy Wood, Herb Nugent, Ketty Johnson, and quite a few others, besides myself.

Q. And again, just briefly, Mrs. Thompson, can you tell us what occurred at this meeting of the District Committee?

Mr. Gladstein: Same objection, Your Honor.

The Court: Overruled. Same ruling.

The Witness: Al Richmond gave a report on the national convention in which he used the outline which had been prepared as a result of the December 22nd meeting. [fol. 247] Mickey Lima announced a recruiting drive and he asked each District Committee member and each National Committee member to establish a quota for themselves for recruiting members to the party. Archie Brown at that meeting announced that charges had been placed against two members of the party in the Bay Area. I believe that's the main part of the meeting.

Mr. Vincent: Q. All right, and can you tell us the next occasion upon which you saw the defendant, Archie Brown, if you did?

A. On February 27th and 28th.

Q. And what was the occasion upon which you saw him then?

A. This was the second session of the District Convention of the Northern California Communist Party.

Q. And where was this convention held, Mrs. Thompson?

A. This was held in St. George's Hall in Oakland.

Q. And can you tell us approximately how many individuals attended this convention?

A. There were approximately 100 who attended this convention.

Q. And what capacity, Mrs. Thompson, did you attend this convention?

A. As a member of the District Committee.

Q. And did you participate in any type of activity at all at this convention?

A. Yes, sir, I did.

[fol. 248] Q. And would you please tell us what you did?

A. I was a member of the Rules and Presiding Committee, and on the Balloting and Credentials Committee.

Q. And this Presiding Committee or Rules and Presiding Committee; did it have a chairman?

A. Yes, sir.

Q. And can you tell us who the chairman was?

A. Archie Brown was the chairman.

Q. And can you tell us just very briefly what occurred on the first day of this two-day convention?

Mr. Gladstein: If Your Honor please, I am going to object to further interrogation along these lines, upon the ground that it's just cumulative. I have no objection to the lady stating the various dates when she saw Mr. Brown, nor the meetings, to identify them, as to whether they were district or whatever they were, and where. But business and what took place—there's no question about that in this case and this is simply cumulative, and I submit it's not—
[fols. 249-250] The Court: I believe that we are entitled to know what took place on the basis that we are entitled to inquire into what occurred at the time and place that she is speaking of, and I will allow the question.

Mr. Vincent: You may answer that question, as to what occurred, just briefly, please, Mrs. Thompson.

The Witness: When the Convention was opened Gus Hall and Dorothy Healey were introduced to the Convention and then Mickey Lima made the opening report to the Convention.

Mr. Vincent: Q. You mentioned a Gus Hall Mrs. Thompson. Could you tell us who Gus Hall was?

A. Yes, he was the General Secretary of the Party.

Q. And Dorothy Healey, can you tell us who she was, if you know?

A. She was the National Committee Member from Southern California.

Q. On that first day, Mrs. Thompson, did the Presiding Committee participate in any activity of any kind?

A. Yes, they met and set up rules for the convention, and then they held a meeting to screen the nominees for members of the District Committee.

Q. And were any elections held during this convention, Mrs. Thompson?

A. Yes, sir. The District Committee members were elected and the District Chairman.

[fol. 251] Q. And what was the occasion upon which you saw him this time?

A. A meeting of the District Committee of the Communist Party.

Q. And where was this meeting held?

A. This was held in the offices of the People's World in San Francisco.

Q. And do you recall the names of any of the individuals of the District Committee who were present at this meeting?

A. Yes, there was Mickey Lima, the Northern California District Chairman, Merle Brotsky, Don Thayer, Al Richmond, Lee Cutnick, Jimmy Wood, Herb Nugent, Archie Brown and quite a few others.

Q. All right. Can you tell us, please, just briefly, what occurred at this meeting of the District Committee of the Communist Party?

A. This meeting was—let's see—Don Thayer and Merle

Brotsky both reported on pre-election activity, things that they had been involved in prior to the primary election.

* Al Richmond reported on the May Day Summit Meeting—Little Summit Meeting—that was to be held in San Francisco. And Archie Brown and Mickey Lima both reported on the May Day Meeting that the party was to hold, at which [fol. 252] Ben Davis was to be the main speaker, and then in the afternoon Claude Lightfoot and Pettis Perry spoke on the Negro question.

Q. You mentioned a Ben Davis, Mrs. Thompson. Can you tell us who Ben Davis was?

A. He was National Secretary of the Party.

Q. And you also mentioned, I believe, a Claude Lightfoot. Can you tell us who he was?

A. Yes, sir. Claude Lightfoot was the National Vice-Chairman of the Party, a member of the National Committee.

Q. And you mentioned a Pettis Perry. Can you tell us who he was?

A. Pettis Perry was a member of the National Committee from Southern California.

Q. When was the next time you saw Archie Brown, if you again saw him?

A. Let's see; June the 4th, 1960.

Q. And what was the occasion upon which you saw him?

A. This was a meeting of the District Committee of the Communist Party.

Q. And where was this meeting held?

A. In the offices of the People's World in San Francisco.

Q. Can you tell us again just briefly, what occurred at this meeting?

A. At this meeting Merle Brotsky presided, Mickey Lima wasn't there, and a discussion was held to try to establish [fol. 253] party policy on the failure of the Summit Meeting, and—I seem to have lost my train of thought on that meeting.

Q. Let me ask you, Mrs. Thompson, do you recall whether or not Archie Brown said anything at this meeting?

A. Oh, yes. At this meeting when we were discussing dates for the second meeting of the District Committee, Archie Brown mentioned that the Trade Union Commission was planning a Trade Union Conference, and he mentioned

this because one of the dates chosen for the District Committee meeting was the one he was involved with.

Q. And what trade union commission was he referring to?

A. This is the Trade Union Commission of the Communist Party, U. S. A.

Q. Can you tell us when the next time was that you saw Archie Brown?

A. I saw him next on June 17, 1960.

Q. And what was the occasion upon which you saw him, please?

A. This was a meeting of the District Committee.

Q. And where was this meeting held?

A. It was held in the offices of the People's World in San Francisco.

Q. And do you recall the names of any of the members of the District Committee who were present at this meeting?

A. Yes. There was Mickey Lima, Archie Brown, Bill [fol. 254] Schneidermann, Douglas Wachter, Joe Graham, myself, among others—

Q. And can you tell us again, briefly, please, what occurred at this meeting of the District Committee?

A. Yes. Bill Schneidermann gave a report on the primary elections and an analysis of the primary elections. Douglas Wachter reported on a trip he had made to Chicago to attend a youth conference. He stated that this conference was essentially a party conference although there had been some people present at the conference who were not party members, but they were sympathetic to the left and to the party's youth work.

He announced the up-coming publication of a new youth magazine called "New Horizons". He stated this magazine, while it wouldn't be advertised as such, would have a basic Marxist policy.

And at the close of this meeting Joe Graham and Archie Brown and Mickey Lima and myself held a brief meeting on some of the problems facing the farm workers' commission.

Q. And can you tell us, Mrs. Thompson, when the next time is that you saw Archie Brown?

A. I saw him again on August the 12th, 1960.

Q. And what was the occasion this time?

A. This was a meeting of the District Committee of the Communist Party.

[fol. 255] Q. And where was it held, please?

A. It was held in the offices of the People's World in San Francisco.

Q. And can you tell us again, briefly, what occurred at this meeting?

A. Yes. There was a discussion of a mimeographed document entitled "Statement of the NEC on Election Policy."

Q. And what do the initials "NEC" mean, if you know?

A. National Executive Committee.

Q. And what National Executive Committee was referred to?

A. The National Executive Committee of the Communist Party, U. S. A.

Q. And when is the next time you saw Archie Brown?

A. Let's see; October 12th, 1960.

Q. You have just testified to having seen him in August.

A. Oh, September. I am sorry; September 17th, 1960.

Q. And what was the occasion in September 1960 upon which you saw him?

A. This was an election and press conference.

Q. And where was that held?

A. It was held at a hall at 3138 Grove Street in Oakland.

Q. And can you tell us approximately how many people attended this meeting?

A. There were about 40 people present.

Q. When is the next time you had occasion to see Mr. Brown?

[fol. 256] A. This next time was on October—October 1st, I believe it was. Is that correct?

Q. What year was that?

A. 1960.

Q. And what was the occasion that you saw him?

A. This was an enlarged meeting of the District Committee of the Communist Party.

Q. And where was this meeting held?

A. In the office of the People's World in San Francisco.

Q. And can you tell us just briefly what occurred at this meeting?

A. Yes. Mickey Lima wasn't present at this meeting.

Archie Brown presided over the meeting, and Bob Lindsay gave a report to the District Committee of the discussion which had been held in the Farm Workers Commission, and an attempt was made to establish party policy on the importation of Mexican farm workers.

Q. And when was the next time, Mrs. Thompson, that you saw Archie Brown?

A. I saw him again on November 17, 1960.

Q. And what was the occasion this time?

A. This was a meeting of the District Committee of the Communist Party.

Q. And where was this meeting held?

A. This meeting was held in the offices of the People's [fol. 257] World in San Francisco.

Q. And can you tell us again, please, just briefly, what occurred at this meeting?

A. Yes. Archie Brown presided over this meeting of the District Committee, and he made the statement during the meeting that the District Chairman, Mickey Lima, was in the Soviet Union, and in Mickey's absence that the District Board had assumed the duties of the District. And he also asked me personally to convey to my husband a message that the Trade Union Commission was going to hold a meeting on December 2nd, 1960 at 1250 Girard Street, San Francisco.

Q. And when was the next time you saw Archie Brown?

A. The next time I saw him was at this meeting at the Trade Union Commission on December 2nd, 1960.

Q. And can you tell us where this meeting of the Trade Union Commission was held?

A. Yes, it was held at Joe Figuerito's home, 1250 Girard Street, San Francisco.

Q. And was there a chairman of this meeting at the Trade Union Commission?

A. Yes, Archie Brown was the chairman.

Q. Can you tell us, again briefly, what occurred at this meeting?

A. Archie made a report to the Commission on the activities in the Bay Area that the party was making in an [fol. 258] effort to gain support for James Roosevelt in his move to have the House Un-American Activities Committee abolished.

He also reported that there had been discussions in the District Board on the activities for the party in the District, and he thought that the District Board was going to recommend that the party concentrate their activities back of the movement to abolish the House Un-American Activities Committee and also on peace.

And then he recommended that a bulletin or pamphlet be prepared on socialism, which would be directed toward members of the trade union movement.

Q. And can you tell us, please, the next time when you saw the defendant, Archie Brown?

A. Yes. I saw him again on January 15th, 1961.

Q. And what was the occasion this time, please?

A. This was a meeting of the District Committee of the Communist Party.

Q. And where was this meeting held?

A. It was held in the offices of the People's World in San Francisco.

Q. And was there a chairman presiding at this meeting, Mrs. Thompson?

A. Yes, sir.

Q. And can you tell us who he was, please?

A. Archie Brown was the chairman for the meeting.

[fols. 259-260] Q. And can you tell us, just briefly, please, what occurred at this meeting?

A. Well, Archie announced to the Committee that Mickey Lima had returned to the United States but he was still on the East Coast, and that while Mickey was gone the District Staff and the District Board had been making an effort to see that party business was carried on as usual.

He said that the District Board had under preparation many subjects to be presented to the District for discussion but they weren't—anything—wasn't ready at that time. Some of the things he mentioned were the House Un-American Activities Committee, the Legislative Commission, youth work, the 81 party conference. Those were the essential things.

[fol. 261] Mr. Vincent: Q. Can you tell us, Mrs. Thompson, when you next had occasion to see Mr. Brown?

A. Yes, I saw him again on April 22, 1961.

[fol. 262] Q. And what was the occasion upon which you saw him?

A. This was a meeting of the District Committee of the Communist Party.

Q. And where was this meeting held?

A. This meeting was held in the offices of the People's World in San Francisco.

Q. And can you tell us, please, just briefly, what occurred at this meeting?

A. Yes. Mickey Lima was back to preside over this meeting and he conducted a discussion of the educational classes which had been planned in the party and—I can't think of—

Q. Do you recall of any other thing which occurred?

A. I can't think right now.

Q. All right. Do you recall the next time when you saw Archie Brown?

A. I saw him again on May 19, 1961.

Q. And what was the occasion this time?

A. A meeting of the District Committee of the Communist Party.

Q. And where was that held, please?

A. It was held in the offices of the People's World in San Francisco.

Q. And can you tell us, briefly, what occurred at this meeting?

[fol. 263] A. Yes, sir. This meeting, Mickey Lima presided over the meeting and there was a discussion of the Negro question, and during the discussion after Mickey's report, Herb Nugent said that he thought it was about time that Archie began to make plans for his campaign to run for the San Francisco County Board of Supervisors and Archie replied to this, "What do you think Operation Abolition was for?"

And then also at this meeting Irving Forman gave—or Roscoe Practor, rather, gave a report on the peace demonstration which had been held in San Francisco during Easter Week, and he said that they were very successful.

and that all clubs of the Communist Party had participated in some way in the demonstration; that they had either participated actively or they had urged other people to participate, and that he felt it was the duty of the Communist Party to encourage the labor movement to take over future support and future sponsorship of these demonstrations and—

Q. That's enough, Mrs. Thompson.

Can you tell us, or do you recall—you testified earlier that you had attended the 17th National Convention of the Communist Party. Do you recall that?

A. Yes, I did.

Q. And will you tell us again, please, when this convention was held?

A. It was held December the 10th through the 13th, 1959.

[fol. 264] Q. And where was it held?

A. In the Hotel Theresa, Harlem, New York.

Q. And can you tell us, please, approximately how many individuals attended this convention?

A. There were approximately 225.

Q. And do you know, Mrs. Thompson, whether or not Archie Brown participated in any type of activity at this convention?

A. Yes, he did.

Q. And would you tell us, please, what he did?

A. He was a member of the Presiding Committee at the convention, and he reported to the convention for the Presiding Committee on at least one occasion.

Q. And do you know how many members were on this Presiding Committee?

A. There were 13 originally.

Q. Do you recall any of their names?

A. Yes, sir. There was Hi Luma, Elizabeth Gurlesman, Guss Hall, Ben Davis, and quite a number of others.

Q. And do you know what the function of this committee was?

A. Yes. They were to establish rules of conduct for the convention and to screen the nominees for the office of National Committee members.

Q. Mrs. Thompson, can you tell us whether or not any caucuses of any kind were held during this convention?

A. Yes, there were.

[fol. 265] Q. And did you have occasion to attend any of these caucuses?

A. Yes, I did.

Q. And where was this caucus held?

A. It was held on Room 1029 of the Theresa Hotel.

Q. And what caucus was it?

A. This was a caucus of the delegates from Northern California.

Q. And can you tell us who was present at that caucus, please?

A. Yes, I can. I think there was Mickey Lima, Northern California District Chairman, Lee Cutnick, Juanita Wheeler, Ketty Johnson and myself, Joe Figueroa, Ralph Izzard, Archie Brown, Al Richmond, Doug Wachter, Sol Wachter. Hi Lima was there. I believe there was one other. I can't think right now which one I have left out.

[fol. 266] Q. All right, can you tell us, please, just again briefly what occurred at this caucus?

A. The many names were proposed from people in the district as nominees for the national committee representing the Northern California District. Archie Brown was among those who was nominated for office. And Mickey Lima, who was presiding during the meeting, said that he felt that it would not be wise for Archie to accept the nomination for election to the national committee because Archie had been elected to an office in his union as a possible test case for the Landrum-Griffin Bill. Archie said that this was true and that he felt it was far more important that he continue with that activity rather than accept nomination for the national committee, because he had been elected to the office with the understanding of the leadership of his union.

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Cross-examination.

By Mr. Gladstein:

Q. Mrs. Thompson, I notice you have no difficulty in remembering the dates and the occasions and the cities and people who were present. I take it you have prepared yourself for this testimony in advance?

A. To some extent, yes.

[fol. 267] Q. Well, very carefully, haven't you, ma'am?

A. Well, yes.

Q. You memorized some reports, didn't you?

Mr. Vincent: Objection, Your Honor.

Mr. Gladstein: Why?

The Court: All right, go ahead, ask the question.

Mr. Gladstein: Q. Did you memorize some reports?

A. I didn't actually memorize reports, no.

Q. You read and studied reports, didn't you?

A. Yes, I did.

Q. Several times, didn't you?

A. Yes.

Q. Over some period of time, didn't you?

A. Not too long a period.

Q. But as you sat here this afternoon, in reply to these questions you were testifying from memorization that had occurred? That's true, isn't it?

A. Well, not exactly. I don't think it was. . . .

Q. You did make reports to the FBI as to probably every meeting you ever attended, didn't you?

A. Yes, sir, I did.

Q. And I don't remember hearing when it was that you first entered the Communist Party at the request of the FBI. When was it?

A. I was accepted into membership in June of 1953.

[fol. 268] Q. All right. And it's fair to say that ever since that time you have made reports as to every meeting you have ever attended of the Communist Party, right?

A. Yes, sir.

Q. Sure. Now, I don't suppose you kept copies of the reports that you made?

A. No, sir.

Q. You typed them up or wrote them up and sent them in to the office of the Federal Bureau?

A. Yes, I did.

Q. And prior to your coming to testify here today, a group of these reports covering the meetings to which you have testified was made available to you for study so that

you could refresh your recollection and testify; that's fair, isn't that right?

A. Naturally.

[fol. 269] Mr. Gladstein: Q. Now, I notice that throughout your testimony, Mrs. Thompson, you referred to the defendant as Archie.

A. Yes, sir.

Q. That's how he is called?

A. That's the only name I have heard used for him, yes.

[fol. 270] Q. In or outside of the Communist Party, the only name you have ever heard concerning Archie Brown is Archie Brown, right?

A. Yes.

Q. You mentioned the People's World as a place in whose offices a number of these meetings occurred. That is the office of a newspaper that's published, what is it, once a week?

A. At the present time, yes.

Q. And you mentioned that on one of these occasions Mr. Brown spoke on the subject of a meeting of some kind on May Day at which Mr. Ben Davis would be present?

A. That's correct.

Q. Now, was that to be a public meeting?

A. Yes, it was.

Q. And was it a public meeting?

A. I don't know. I did not attend it.

Q. But it was to have been a publicly advertised meeting at which anyone who wanted to could come and hear a well-known communist named Ben Davis speak, right?

A. That's correct.

Q. You have told us that on one of these occasions Mr. Brown made a suggestion that a pamphlet be prepared dealing with the subject of socialism?

A. Yes, sir.

[fol. 271] Q. Was such a pamphlet prepared?

A. Not to my knowledge.

Q. Was this a pamphlet which, after being written, was to be disseminated publicly?

A. That was my understanding, yes.

Q. And was it to be disseminated under the auspices of the Communist Party?

A. Yes, sir.

Q. And was it to state in essence the position of the Communist Party on the subject of socialism?

A. I couldn't say as to that.

Q. But in any event, it's perfectly clear that what Mr. Brown was suggesting was that a document be prepared, printed, published and disseminated publicly on the subject of socialism, right?

A. Yes, sir.

Q. Now, you have known, I take it, for a long time this man named Mickey Lima whom you have mentioned?

A. For quite some time, yes.

Q. And you tell us that there was a time when he visited the Soviet Union?

A. Yes, sir.

Q. You know that he would have been required to get a passport and that requires application to the State Department of the United States; you know that, don't you?

[fol. 272] A. I understand that's the procedure. I'm not fully acquainted with it.

Q. But I mean, it is correct, is it not, that this visit of Mr. Lima to the Soviet Union or any other country he may have gone to was pursuant to a passport obtained on application to the State Department. That's right, isn't it?

A. I guess so.

Q. When he returned, I suppose he made reports on what he had seen, what he had done and all that? I am not asking for the contents of them; I just want to know, did he?

A. I attended a party where he gave a report on his trips.

Q. As a matter of fact, he gave public interviews to the newspapers of this city, didn't he, in which he described where he had gone?

A. I am not sure about that. I don't take the San Francisco papers.

Q. Oh, I see. Well, didn't he report that he had been interviewed by the San Francisco press and that stories were carried on where he had been, what he had done?

A. I can't recall any specific instance of his reporting that.

Q. Your report to the Federal Bureau might have some mention of those things?

A. They might have, if it happened.

Q. These peace demonstrations around Eastertime of [fol. 273] 1961, what were those, marching in the street or parading or something?

A. Well, that was the peace march up the Peninsula, and then they gathered in Golden Gate Park and from there they proceeded to Union Square for a public meeting.

Q. I see. Was this just under the auspices of the Communist Party or was it an effort of several groups, or what?

A. It was an effort of several groups, I understand.

Q. Do you know any of the other groups that were involved in it?

A. Not off-hand, no.

Q. Would that be in your reports?

A. It might be. I can't recall for sure.

Q. Are you quite certain that you don't remember, Mrs. Thompson, that that, those peace demonstrations, were sponsored in part by the Friends Group, the Quakers?

A. That could be possible, yes.

Q. Is there any doubt in your mind about that?

A. I am not positive. The arrangements for that were made in San Francisco, and all I heard were brief reports before the district committee, and I do not take an active part in the San Francisco organizational activities.

Q. You are not able to say one way or the other whether the decision or discussion to participate in the peace demonstrations was taken in response to a general request by the [fol. 274] Quakers for assistance in making that a successful march? You don't know, do you?

A. No, I do not.

Q. And now you have said at various times that, oh, elections were being conducted at various of these meetings which you testified about, and you have used the word "screening," that is, screening of candidates for an office of some kind. Were you yourself on the screening committee at any time?

A. Yes, sir.

Q. What did the screening—without going into detail,

what did it consist of? Couldn't anybody who was there run for office?

A. Yes, but a preferred list of candidates was made up.

Q. I see. And you were on that preferred list at various occasions?

A. Yes.

Q. Yes. Screening wasn't, let us say, sufficient of a screening to ascertain you were there in the interests of the Federal Bureau?

A. No.

Q. All right. And the convention in New York City, that hotel; is that a public hotel that this was at?

A. Yes.

Q. Was it—I think you said the convention delegates [fol. 275] numbered somewhere over 200?

A. Yes, sir.

Q. I suppose that it must have been held, then, in some sort of a large hall or big dining room or something; is that right?

A. That's correct.

Q. And would it be correct that prior to the convention taking place you discovered upon your arrival in New York City that it was a matter of public knowledge that such a convention was going to be held, and that there were press reports in the New York papers about it?

A. Yes, sir.

Q. That's true. And during the convention, is it true that reports were given to the New York press from, I suppose, a committee of some kind of the convention as to what they said took place, and so on?

A. Yes, I believe there was a press committee.

Q. All right. And while you were there, you did see reports in the New York press about this convention that was going on, is that right?

A. Some of them, yes.

Q. Some of them, yes. And in all of those meetings—let's see, I suppose it goes without saying Mr. Brown registered under his own name and was called Archie Brown, and everybody knew him as such? That's true, isn't it? [fols. 276-282] A. Yes, sir.

Q. And you didn't see him at any time wearing a dis-

guise or beard or anything else to try to conceal his identity, did you?

A. No, sir.

[fols. 283-286] TUESDAY, APRIL 3, 1962

[fol. 287] GOVERNMENT RESTS

Mr. Poole: So with that understanding, Your Honor, and with the stipulation of the defendant and his counsel, at this time the Government will rest.

[fols. 288-317] MOTION TO ACQUIT THE DEFENDANT

Mr. Gladstein: Your Honor, I address a motion to the Court to acquit the defendant or to direct the jury to return a verdict of acquittal, in the alternative to dismiss the indictment, essentially to acquit the defendant of the charge,

[fol. 318] Mr. Poole: If it please the Court, I don't believe [fols. 319-339] that the Government will be quite as long to respond to the motion as was consumed in its presentation.

Let me say, so that it is very clear as to the Government's position, that it is our understanding and our reading of Section 504 of the Act that the Act makes it unlawful for a member of the Communist Party at the same time to be a member of the executive board of a labor union, and that it does this without requiring specific allegations or proof in the particular cases, that the particular Communist Party member is one who embraces all or any of the unlawful activities of the Communist Party, or whether he embraces them or not. Nor is it requisite to show that the labor union, membership on whose executive board is proscribed by the Act, must be one which is engaging in or would engage in

or could engage in, or that the executive board of which he is a member engaged in or was about to engage in, political strikes, or that he himself encouraged or participated in or desired to accomplish political strikes.

[fol. 340] DENIAL OF MOTIONS FOR A VERDICT OF ACQUITTAL
OF A JUDGMENT OF ACQUITTAL

The Court:

I don't believe that type of intent, or anything of that [fols. 341-350] kind, is required under this statute. Congress has very clearly stated, very clearly written a prohibition, I think. If I agreed with you, I think I would have to grant your motion immediately. I don't think that the Government has any evidence of any specific intent in this record at this time of that nature or type, or of any kind, as a matter of fact. So we wouldn't have to worry about that feature.

Now, I disagree, and your motions will not be granted, and I do not believe that we have a bill of attainder here. I do not believe in the First Amendment attack which you make. Under those circumstances, I think I should rule at this time and not reserve ruling. It is my intention under all these circumstances. Therefore, your motions will be denied for a verdict of acquittal or a judgment of acquittal at this time.

[fol. 351] OFFERS OF PROOF BY MR. GLADSTEIN, OBJECTIONS
THERETO AND SUSTAINING THEREOF

Mr. Gladstein: With Your Honor's permission, and on the assumption that the prosecution has rested, and when the jury returns we will announce that it has rested, and the offers of proof which I am about to make pursuant to conversations that we have held in chambers will be deemed to have been made and ruled upon as of a time subsequent

to the reconvening of the jury and the resting of the prosecution;

Mr. Poole: I think in this matter both sides stipulated, Your Honor.

The Court: Yes. I think under the stipulation made this morning in connection with the motions, the same procedure would follow, so there will be no trouble as far as the record is concerned.

Mr. Gladstein: There is testimony that I would want to elicit relating generally to the subject of the giving by counsel of advice and reliance in good faith upon the advice of counsel. My offer in that respect of proof is as follows:

I would call to the witness stand my partner, Mr. Norman Leonard, and if I were permitted to, examine him by appropriate questions and, if he were permitted appropriately [fol. 352] to reply to them, he would testify in substance as follows:

That he is a member of the Bar of the State of California and has been admitted to practice before the Supreme Court of the United States, and he has practiced law in San Francisco since the year 1938, at all times as a member of the firm which bears our present name and in which he is now a partner.

That since 1938, when he joined our firm, he has been one of the attorneys for the International Longshoremen's and Warehousemen's Union, both the International Union with offices here in San Francisco, and Local 10, the longshore local here in San Francisco.

He would testify that in October of 1959, shortly after the Labor Management Reporting and Disclosure Act of 1959 was enacted, he was asked to begin research into the provisions of that law and its possible effect upon the union and its activities, that request coming from the International Union. He undertook that research and he prepared an analysis of all sections of the law and this analysis was subsequently published in two parts in the newspaper of the International Union called The Dispatcher. A portion of that analysis would be found in The Dispatcher of October 9, 1959, a copy of which we would offer in evidence, to the extent that it contained the analysis to which Mr. Leonard would be referring, not to other portions of it that would be

irrelevant to the issue. The other portion of the analysis, [fol. 353] he would testify, was published in the issue of October 23, 1959 of The Dispatcher. The Dispatcher of October 23, 1959, is presently in evidence as an exhibit introduced at the request of the prosecution, and we would ask the Court's permission to read to the jury those two portions of Mr. Leonard's analysis, the one that appears in the October 9 issue and the one that appears in the October 23 issue presently in evidence.

Mr. Leonard would further testify that shortly after October 1, 1959, he was advised by Mr. Harry Bridges, President of the International Longshoremen's and Warehousemen's Union, that Mr. Bridges had received from Secretary of Labor Mitchell a teletype communication referring to Section 504 of the law and requesting from Mr. Bridges certain information relating to that section. That teletype, Your Honor, is in evidence and is contained here in the form of a reprint of the teletype in the issue of the Dispatcher of October 23, 1959.

Mr. Leonard would testify that after this information from Mr. Bridges came to him he resumed further legal research into the problems specifically presented by Section 504; that there was a meeting of the members of the firm at which this teletype was discussed by the partners. Following that he made a first draft and subsequently there were redrafts made of a reply resulting in a sending to Secretary of Labor Mitchell of the communication from the [fol. 354] firm of Gladstein, Andersen, Leonard and Sibbett, a copy of which appears in the October 23 issue of The Dispatcher.

I would ask Mr. Leonard, and he would testify, if permitted, concerning a request that the International Union made of our firm: that one of its members accompany Mr. Bridges on a trip to Portland, Seattle, Los Angeles, and also to meetings here in San Francisco, at which, as the International Union president, Mr. Bridges would present a trade union analysis and Mr. Leonard, if he be the one—and he was—would present a legal analysis of the law in all of its sections, including Section 504. I would not elicit from him any testimony as to what he said in regard to sections other than 504 but merely testimony that he did

address himself to all of the sections, and with respect to Section 504 I would ask him to testify and he would testify as to what he said on that subject.

He also was present, he would testify, when Mr. Bridges discussed the application of the law, Section 504 in particular, to the union.

By the way, I should say that the meetings that Mr. Leonard would testify he addressed were meetings of the local officials of the local unions who would gather, who were brought together in each of the areas—that is to say, the union located in Portland—unions, I should say, the longshoremen and warehousemen and these in nearby areas were brought together in Portland—for that purpose, [fol. 355] similarly Seattle, similarly Los Angeles, similarly San Francisco.

Mr. Leonard would then testify that in October of 1959 he attended a meeting of the Executive Board of Local 10. He was accompanied by our partner, Mr. George Andersen, and Mr. Bridges. That at this meeting of the Executive Board, Mr. Brown, the defendant here, was present. There was held at that time a discussion of the law. Reference to this occasion is already found in the prosecution's case—I don't have the date in mind but it can be readily found. The minutes of the meeting of the Executive Board to which I refer state that Mr. Leonard—they take note of Mr. Andersen's presence and speaking to the group, the same with Mr. Bridges, and make note that Mr. Leonard made a comprehensive and informative report on the law.

Mr. Poole: Who made the report?

Mr. Gladstein: Mr. Leonard.

Mr. Poole: Thank you.

Mr. Gladstein: Mr. Leonard has in his possession, taken from the files in our office, all of the notes which he used on the occasion of that meeting, and he would testify with respect to Section 504, that the guide—the guideline notes that he has show "Section 504, subject of our correspondence with Secretary re who it applies to, what it means." He would testify that based upon those notes he said in substance that in his opinion the law was unconstitutional [fol. 356] on its face. I am speaking now of 504. That there was no case in which the Supreme Court had permitted Congress to make criminal the act of serving on an

executive board or as an officer of the union while maintaining membership in the Communist Party. He said that in the light of the Supreme Court's decisions—he would testify that he said in the light of the Supreme Court's decisions in the cases referred to in the letter of the firm to the Secretary of Labor, specifically, the Douds case, the Yates case, and the Updegraff case, he expressed the belief that before Section 504 could be held constitutional it would be necessary for the Government to prove that a union officer would have to be shown to have the intention of using his union office for the purpose of instigating political strikes or some other kind of illegal activity. He would testify that he told them—this is the Executive Board with Mr. Brown present—that in his opinion, without such an interpretation in the application of the law, he did not believe that the law was valid. He would testify that he said in view of the legislative history of the law he believed that the Government would have to prove that a person deliberately concealed his membership in the Communist Party before he could be convicted. He would testify that he said that if a man were openly elected to serve on the Board the Government would have a hard time convicting him of any offense. He would testify that he recollects that Mr. Brown was present at the meeting.

[fol. 357] And that he would further testify that he subsequently addressed a membership meeting of the local—this is on another occasion, Your Honor—which in turn was also addressed by Mr. Andersen and Mr. Bridges, and he said that with respect to Section 504 substantially the same things that he said before the Executive Board, and that would be the membership meeting of the local. He would testify that he discussed many other provisions of the law and he would be prepared, though I would not seek to elicit it, because it would not be relevant—what he said, he would testify as to what he said as to the other sections.

Mr. Leonard would further testify that he recalls that at the membership meeting, which occurred during the month of November 1959, at which there was this discussion—that is, further discussions of the provisions of the law, that there were questions put to him on various phases of the law by members of the union, and he recalls Mr. Brown asking whether in view of the well-known fact that

he, Mr. Brown, was a communist, would the law apply to him. Mr. Leonard would testify that he replied in substance that he did not feel it appropriate to give specific advice to specific individuals at a public meeting and he suggested that if any members had any specific questions they should consult privately with their counsel.

Mr. Leonard would also testify that he was subsequently [fol. 358] informed that Mr. Brown did have a private consultation with Mr. Andersen, and I will come to that in a less hearsay form a little later, Your Honor:

Mr. Leonard would testify that the advice he gave was given in the good faith belief that it correctly represented the law.

He would further testify that sometime later, in November of 1959 or thereabouts, his attention was directed to an Associated Press dispatch which indicated that a Department of Justice spokesman had concurred in the position taken by the law firm's letter to the Secretary of Labor and that he, Mr. Leonard, wrote to the Attorney General requesting confirmation of that information.

[fol. 359] Mr. Gladstein:

In that connection, I would ask Mr. Leonard to identify, he would identify, and I would offer it in evidence as a letter written on or about November 25, 1959, the following on the letterhead of our firm, addressed to Attorney General, Department of Justice, Washington, D. C.:

"Dear Mr. Attorney General:

"With reference to the recent correspondence between the Secretary of Labor and Mr. Harry R. Bridges, President of the International Longshoremen's and Warehousemen's Union, our attention has been called to an Associated Press news story out of Washington under date of November 21 in which it is reported, in part, that:

"A Justice Department spokesman said Bridges evidently is right on one score. There isn't any specific

requirement that he must report to the Government [fol. 360] on the possible communist or criminal status of ILWU officials and employees.'

"We would appreciate your confirmation of this statement and request that if a formal press release was issued concerning this matter you be good enough to send a copy to us.

"Thank you for your courtesy.

"Very truly yours, "Norman Leonard."

And the file copy shows that a copy of this letter was also addressed to Secretary of Labor in Washington, D. C.

Mr. Leonard would then testify that he received in reply to that last letter a communication on the letterhead "Department of Justice, Washington, D. C.," dated December 1, 1959, addressed to him, care of our firm here in San Francisco. I am reading:

"Dear Mr. Leonard:

"This responds to your letter of November 25 addressed to the Attorney General.

"The undersigned was the Justice Department spokesman referred to in the Associated Press dispatch from which you quoted. The statement was based upon Section 504 of the Labor Management Reporting and Disclosure Act. That section provides that persons who have been convicted of or served [fol. 361] prison terms for certain specified offenses may not serve in certain specified official capacities in labor organizations. It says that no labor organization or officer shall knowingly permit any person to assume or hold any position in violation of that section. The penalty for willful violation is \$10,000 or one year in prison or both. Nowhere in this section or elsewhere in the Act do I find any requirement that a labor organization or its officers must report on the communist or criminal status of union officials and employees. Lawyers in the Department of Justice who have studied the statute concur in this view.

"The Associated Press dispatch was based on a ver-

bal inquiry by the reporter assigned to cover the Department of Justice. No press release was issued.

"Sincerely, "Luther A. Huston, Director of Public Information."

Mr. Leonard would testify further that upon receipt of the letter from Mr. Huston he promptly forwarded it to Mr. Bridges, and there is marked for identification as Defendant's B a letter of December 8, 1959, which we would then offer in evidence, and it appears on the stationery of [fol. 362] the International Longshoremen's and Warehousemen's Union. It is dated December 8, 1959. It is addressed to "All ILWU locals."

"Dear Sirs and Brothers:

"On October 29, 1959, copies of a telegram from Labor Secretary Mitchell to President Bridges requesting certain information under the Kennedy-Landrum-Griffin law and the reply of the International attorneys was sent to you. The union's attorneys have recently received a letter from the Department of Justice, copy of which is enclosed, that states in part:

"Nowhere in this section or elsewhere in the Act do I find any requirement that a labor organization or its officers must report on the communist or criminal status of union officials and employees."

"This of course confirms, in part, our position in regard to the law and our refusal to comply with the Secretary of Labor's demand.

"Fraternally yours, "Harry Bridges, President."

With this addition that I would elicit from Mr. Leonard, testimony based on the notes he made concerning his research as to the legislative history of this section, that he compiled and collated the material and concluded and reported that in his opinion the congressional purpose in this [fols. 363-372] law was to prevent the calling or instigation of political strikes. Now that would be the offers from Mr. Leonard.

[fol. 373] Mr. Gladstein:

Now, the other testimony, Your Honor, that I embrace now in an offer of proof is testimony by my partner and Mr. Leonard's, Mr. George R. Andersen. I offer to prove that if he were called and sworn, and if I were permitted to put appropriate questions to him, he would appropriately reply in substance as follows: He is an attorney at law admitted to practice in the year 1927 before all the courts of the State of California, and he is a member of the Bar of the Supreme Court of the United States and has been practicing law since the date 1927. That the defendant, Archie Brown, has been his client since approximately 1935. That in the late part of 1959, at a time when Mr. Brown was a member of the Executive Board of Local 10 of the ILWU, but shortly before this law, Section 504, had become law but while it was pending and being considered for legislation, Mr. Brown came to the office and consulted Mr. Andersen. That he advised Mr. Andersen, although Mr. Andersen knew it to be so, that he was a member of the Executive Board and that he was also a member of the [fol. 374] Communist Party, and he wanted to know, in the event this pending legislation became law, if he should resign from the Executive Board or whether or not he was within his rights to stand for reelection, serving out the balance of his term and then stand for reelection. That he sought Mr. Andersen's legal advice in relation to this law and his position with respect to the Board—that is, to serving on the union board while being a member of the Communist Party. Mr. Andersen would testify, will testify, that he advised Mr. Brown that in his, Mr. Andersen's, opinion the law would be unconstitutional, if adopted, for many reasons. That from what he had seen being considered, it was vague and indefinite, it would be unconstitutional as special rather than general legislation. That it would be an unconstitutional attempt to interfere with the internal affairs of a labor union. That it would be denying to labor union members the right of free choice in their representatives. That the status of simply being a communist and thus being prevented from being a person holding an office in a union would amount to an attain within the meaning

of the Constitution. And that if a person tried to defend himself by giving evidence, it would amount to giving evidence against himself, in the sense that no one could defend himself against the charge if he were in fact a member of the Communist Party, because that would tend to incriminate him under another law. And this would deprive a man [fols. 375-379] of due process, and he will testify that he gave him general incidental advice and discussion regarding these concepts.

Now sometime afterwards there was a union executive board meeting, and I won't repeat—that's the one that Mr. Andersen and Mr. Leonard were present at, and Mr. Brown was present at, and also a membership meeting at which, as Mr. Leonard's testimony would have shown, Mr. Brown put a question to Mr. Leonard. It was directly after that meeting and those discussions that Mr. Brown again came to Mr. Andersen's office when in view of the fact that the bill had become law the matter was again thoroughly discussed, and Mr. Andersen again advised Mr. Brown regarding the law in the manner already set forth, expressing the view that the law was unconstitutional for the reasons already stated.

Mr. Andersen will testify that Mr. Brown said to him, "I will rely on that advice and I will act accordingly."

In addition, I would elicit from Mr. Andersen testimony corroborating the testimony of Mr. Leonard with respect to the meetings at the Executive Board and the membership meeting as to what took place.

[fol. 380] The Court:

[fols. 381-383] And at this time I will sustain Mr. Poole's objections to the offers of proof and believe it is proper to do so.

[fol. 384] Mr. Poole: The Government rests, Your Honor.
The Court: Very good.

Mr. Gladstein: We will call Mr. Harry Bridges to the stand, Your Honor.

HARRY BRIDGES, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: State your full name, your occupation and your address to the Court and jury.

The Witness: My name is Harry Bridges. My occupation is Trade Union officer; my address, business address, 150 Golden Gate Avenue, San Francisco. My home address is 35 Palmquist Court.

Direct examination.

By Mr. Gladstein:

Q. Mr. Bridges, you are the president of the International Longshoremen & Warehousemen's Union, are you not?

A. That's correct.

Q. And where does that union have its offices?

A. Here in San Francisco; that is, its head office.

Q. Its head office. By "International Union," just in general what is meant by that expression, sir?

A. We have always taken it to mean a union that extends [fol. 385] beyond the borders of this country.

Q. Do you have local unions affiliated with the International in countries other than the United States?

A. Yes, we do.

Q. Which country?

A. Canada, for example. Only Canada.

Q. And do you have locals in various Pacific Coast states?

A. Yes.

Q. Anywhere else?

A. Hawaii, Alaska, Washington, Ohio, Illinois.

Q. How long have you held the office of president of this union, Mr. Bridges?

A. As International president, since 1937. Prior to that I was West Coast president, about a year before that, 1936.

Q. And in a word, for how many years have you been directly connected and affiliated with the trade union movement?

A. You mean here in the United States?

Q. Here or elsewhere.

A. Oh, about 44 years.

Q. Mr. Bridges, there is in evidence as Government's Exhibit No. 1 the document purporting to be the Constitution of the International Union. Would you just look at it and tell us if that is true.

A. This is a copy of your constitution. I notice it says here "As amended April 12, '55." It is possible there's been subsequent amendments.

[fol. 386] Q. Of any consequence, that you remember?

A. No.

Q. The constitution commences with the following Preamble, Mr. Bridges. I read it to you and then I will put a question to you about it:

"Preamble. Since the beginning of history, mankind has struggled individually and collectively for political, economic and cultural betterment, and has found the greatest ability to make such advancement through democratic organization to achieve common aims. Therefore, we, who have the common objectives to advance the living standards of ourselves and our fellow workers everywhere in the world, to promote the general welfare of our nation and our communities, to banish racial and religious prejudice and discrimination, to strengthen democracy everywhere and achieve permanent peace in the world, do form ourselves into one indivisible union and adopt the following constitution to guide our conduct and protect our democracy within the union."

Was that preamble in effect between October 1959 and May 1961?

Mr. Poole: Just a moment, if it please the Court. Your Honor, that is a mighty fine statement, but I object to it as being not relevant to this trial. The preamble of the constitution is no issue here whatsoever.

[fol. 387] Mr. Gladstein: It is in evidence. It is a government document.

Mr. Poole: It's not in evidence for all purposes, for all things, Mr. Gladstein.

The Court: It's what? You say not in evidence. . . .

Mr. Poole: I say it is not, Your Honor; it wasn't offered for that purpose.

The Court: Well, there was no limitation on this on admission.

Mr. Poole: Let me make this very clear. I don't want to stand on that objective of what's in this document. I am simply saying—

The Court: Well, the question is the dates. I will overrule the objection at this time.

Mr. Gladstein: You wish the question read, Mr. Bridges?

The Witness: Yes, that constitution has been in effect for many years. Many years prior to the dates you mentioned.

The Court: And up to the present? I mean, there's been no interruption? The question was "between October '59 and May of '61."

The Witness: It's very much in effect right now. More than ever.

Mr. Gladstein: Q. And during that period?

A. Yes.

[fol. 388] Q. Now, Article three of that constitution purports to set forth the objectives of the organization. I read to you what it says, and then I will put a question to you:

"The objects of the organization are, first, to unite in one organization, regardless of religion, race, creed, color, political affiliation or nationality, all workers within the jurisdiction of this International; second to maintain and improve the wages, hours and working conditions for all of its members; third, to educate the membership of this organization in the history of the American labor movement and in present day labor problems and tactics; fourth, to secure legislation in the interest of labor and to oppose anti-labor legislation."

That, too, I take it, Mr. Bridges,—that provision was also in effect throughout the indictment period that I have mentioned and before?

A. Yes.

Q. As the president of the union, do you find a recitation of your powers and duties in the constitution?

A. Yes, it's there.

Q. I turn to a portion on page 8 headed "Duties of Officers," and I will read to you Section 7:

"The president shall be the executive officer of the International and at all times shall supervise the [fol. 389] affairs of the International and enforce this constitution and all of the decisions and laws of the International. He shall interpret the constitution and decisions of the International whenever any question regarding interpretation shall arise. He shall preside at all conventions and executive board meetings of the International and shall make a written report of his official acts and of the state of the International to each convention. He shall appoint all International committees and shall be an ex officio member of each such committees. If so directed by convention or upon the demand of a majority of the executive board, or whenever he may deem it necessary, he shall order an audit of the books of any local and shall appoint a Certified Public Accountant for that purpose. He shall order a monthly audit of the books and accounts kept by the International secretary-treasurer and shall designate a Certified Public Accountant for that purpose. With the consent of a majority of the executive board he may, and upon request of locals representing a majority of the members of the International, which request shall have been approved by a two-thirds vote of the regular membership meeting of each local joining in the request, he shall call a special convention of con-[fol. 390] ference of the International. At such times as he may deem it necessary, or upon the request of a majority of the members of the executive board, he shall call a special meeting of the executive board. As president, he shall cast a vote on any proposition before the executive board or the convention only when there is a tie vote. He shall perform such other duties as are provided for elsewhere in the constitution or as may be necessary in order to carry on the business of the International, and shall have full power to do all things necessary to the carrying out of his duties as International president."

That, too, was in effect during the period I have asked you about?

A. Right.

Q. And did you, as president, operate within the framework of this constitution and the provisions I have read?

A. At least we try to.

Q. To discharge your duties as you are supposed to, is that what you mean?

A. That's right.

Q. Now, there is mention—there was mention of the executive board of the International Union. I take it there are provisions in the constitution. . . . Yes, I see it here. You have a section entitled Section 11 which states the [fols. 391-392] powers and duties of the board over which you preside; is that right?

A. Right:

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[fol. 393] Mr. Gladstein: Q. Now, Mr. Bridges, in addition to being International president, do you maintain membership in one of the locals of the International?

A. That's right.

Q. Which one?

A. Local 10, San Francisco, Longshore Local.

[fol. 394] Q. And how long have you been a member of that union?

A. Since 1933.

Q. Could you give us just in a word the structure to show how a member of a local union is related to the International Union, just briefly?

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The Witness: Briefly, the International Union is made up of a number of local unions located here and there, mostly in the Western States of the United States, British Columbia, Alaska and the state of Hawaii, with scattered locals elsewhere. And altogether these locals form the International Union as such, and all the locals are autonomous. They, in effect, have the same status, more or less, you might say, as states of the Union to the United States. And generally speaking, our constitution and rights

of the locals are based on the United States Constitution, all being completely and fully autonomous politically and economically.

[fol. 395] Mr. Gladstein: Q. Does everyone who is associated with your International Union—is he required to be a member of one or another of the locals?

A. Yes. Well, he is a member. The requirement part is what made me stumble. Usually they are members. There are exceptions, but mighty few.

Q. Mr. Bridges, there is in evidence a copy of the minutes of a special meeting of the executive board of Local 10 held on October 29, 1959, in this city, and the minutes show you as being present. Do you recall that occasion? If not by date, perhaps I could suggest by subject matter: It reports discussions including by you, concerning the Landrum-Griffin Law.

A. I don't recall that specific meeting exactly. We have had many meetings and many meetings of that local, too, on that subject. Maybe not special meetings. There's a difference whether it's a regular meeting or a special meeting, but—

Q. Well, this one, Mr. Bridges, is designated a special executive board meeting, and would it refresh your recollection, perhaps, if I were to suggest that the minutes show you as being present, Mr. George Andersen, Mr. Normal Leonard, and that all three of you were called on by President Calaghan for the purpose of acquainting the members and the various committees with the provisions of the new law?

A. We had such meetings called at our request by every one of our locals, one meeting at least of that kind, for that [fol. 396] particular purpose.

Q. Do you recall attending a meeting, without regard to the date? Perhaps that....

A. Yes.

Q. Do you recall attending such a meeting here in San Francisco?

A. Yes.

Q. You know the defendant, Archie Brown, do you not?

A. Very well.

Q. You have known him for many years?

A. I do.

Q. As a working longshoreman?

A. Right.

Q. Do you recall seeing him present at a meeting of the executive board, special executive board, minutes of which showed him to be present where such a discussion took place?

A. I'm not so sure of that.

Q. In other words, you would rely there on the minutes only?

A. Yes.

[fol. 397] Q. Was there something taking place in the field of legislation, Mr. Bridges, relating to that passage that I read to you about the union's interest in securing favorable legislation and opposing anti-union legislation that was related to this executive board meeting?

A. Yes.

Q. And what was that legislation?

A. We were specifically concerned with this law, as it was specifically directed against our union as such.

[fol. 398] Mr. Gladstein: Q. Did you speak to the members on that subject at that executive board meeting?

A. As I recollect, at great length.

Q. The minutes show, Mr. Bridges, at one portion that President Calaghan then called on International president Harry Bridges, who explained what "our union approach would be to the new bill. He said that the answer was a simple one, business in the same old way in the same old fashion, with the full understanding by the rank and file. We will deal with this new law just as we have dealt with others in the past."

Now, I take it that this does not represent all of your remarks on that occasion, does it?

A. No.

Q. What did you say, Mr. Bridges, to the executive board

members on the subject reported here, the union's approach [fol. 399-416] to the new bill?

[fol. 417] • The Court: All right, gentlemen. I am ready to rule on the objection, and I will overrule the objection.

All right, proceed with your question.

Mr. Gladstein: Q. Mr. Bridges, this directs your attention to the special Executive Board meeting of October 29, 1959, which began, the minutes say, at 8:25 p. m. and [fol. 418] terminated at 11:00 o'clock at night.

I ask you now, and confine yourself, please, to only that portion of this law which is designated Section 504, what it was that you said on that occasion to that meeting?

A. That meeting was one of many meetings we had, and what I said specifically was that due to this law, we could no longer operate the union as a democratic institution, operate it honestly, let the membership elect whom they chose as officers. We could no longer follow and support trade union principles, vital trade union principles which we knew from experience were vital to our existence. And that our union would be the first union attacked under this law for political purposes.

Q. What did you say, if you recall, in which the remark, if it was present, was made by you to this effect, that, "We will do business in the same old way and in the same old fashion, with the full understanding by the rank and file"? Did you say it, first of all, in that form?

A. Well, I don't. . . . That might be the minutes. That was not—I think that could be a slight distortion. I wouldn't say deliberately. The secretary keeps the minutes. But what I meant was just what I said, that no longer can we operate the union as a democratic organization, as an honest organization. No longer could we be a trade union. That's what I said. I still say it.

[fol. 419] Mr. Poole: Just a moment. I ask that be stricken.

Mr. Gladstein: The last may go out.

Mr. Poole: And ask the jury be admonished to disregard it.

Mr. Gladstein: I will stipulate the last statement may be stricken.

The Court: Yes, it may go out.

Mr. Gladstein: Q. Mr. Bridges, I don't know whether you recall it, but how long did you speak on that occasion, approximately?

A. Oh, I don't know. I figured I spoke long enough.

Q. That doesn't help us. How long?

A. Well, according to the minutes of the meeting, it recessed at 11:00 p. m. that night, and when you are competing with lawyers, as you well know, why. . . . I would say, I guess, I possibly spoke between half an hour and an hour. I spoke on more than Section 504.

Q. I understand.

A. But this is limited to 504.

Q. You spoke on all other aspects of the law, too; you spoke on other aspects of the law?

A. Generally to the point that we would do our best to adjust—

Q. Just did you—

The Court: Yes or no.

[fol. 420] Mr. Gladstein: Just yes or no.

The Witness: Yes, Your Honor.

Mr. Gladstein: Q. Now, Mr. Bridges, are there any powers in the Constitution of your union that give you any authority to remove anyone from an executive board of a local union or prevent you from running?

A. No.

Mr. Poole: Just a moment, please. I will object to this as not being relevant, if it please the Court. If there is an answer, I ask it be stricken. I could not see the witness because of Mr. Gladstein.

The Court: The answer may go out and it is to be disregarded. I will sustain the objection—stating his powers.

Mr. Gladstein: Q. The Constitution has a provision that refers to a document called The Dispatcher. That is the newspaper, the official newspaper of the union?

A. Yes.

Q. And I will ask you whether Article 20, which I now

read, was in effect during all the period that I have asked about:

"A newspaper shall be published by the International Union not less than 26 times annually. Every member of the union shall, by virtue of his membership, receive the newspaper. The Executive Board shall fix by [fol. 421] resolution the subscription price of the newspaper and the sum fixed shall be set aside from the per capita of each member to pay for his subscription in accordance with postal laws and regulations. The editor shall be appointed in the first instance and his salary shall be fixed by the International President subject to confirmation by a majority of the Executive Board. The editor's tenure shall be at the please of the Executive Board. The editor shall work under the supervision of the entitled officers."

(That was in effect?

A. Yes.

Q. And during that period, Mr. Bridges, which of the titled officers, if any of them, was directly supervising the work of the editor-in-chief?

A. I was.

Q. And is this true about all of the issues of the Dispatcher?

A. Yes.

Q. There is in evidence Government's Exhibit 8. I show it to you and ask you if you recognize it as a copy, true and correct copy, of the Dispatcher for the date it bears?

A. That's right.

Q. That is the newspaper that is sent to each and every [fol. 422] member of the union?

A. That's right.

Q. And all of the contents in this newspaper were submitted to you for approval before this was published?

A. Well, all the important. . . . Not all of them. All the—

Q. Well—

A. There's a lot of minor items.

Q. Yes, I understand. Let me point out the three items that the Government called attention to here. On page 1,

a reference to a conference in Fresno. Now I think you will find, Mr. Bridges, that the story continues to a subsequent page in that issue, on which page you will also find, I think, two other references to the same Fresno conference.

A. That's right. That was approved by me.

[fol. 423] Mr. Gladstein: Well, I take it there is no objection.

Ladies and gentlemen, with the Court's permission, I am reading to you from the issue of January 29, 1960, of this newspaper called The Dispatcher, published by the International Longshoremen's and Warehousemen's Union. The headline reads, "California ILWU Locals Urge All-out Fight Against Enemies." The sub-head is, "Political Goal Set for 1960." The date line is Fresno, and the text is as follows:

"A ringing call for independent political action on legislative issues and in the 1960 elections came from a joint meeting here January 23 of the ILWU Northern and Southern California district councils.

"We call upon all workers and all leaders of labor to struggle together against the enemies of labor,' a policy statement said. 'We call upon them to formulate a joint policy in the interest of the whole people—a policy which will give strength and meaning to a program of independent political action.'

"A statement adopted by the meeting saw 'opportunities opening up in political action' for the ILWU which 'maintained our union integrity and our dignity' in the [fol. 424] face of compromise and appeasement by 'tame, compliant and conforming' top AFL-CIO labor leaders.

"There is increasing disillusionment and disgust with the top labor leadership of the AFL-CIO on its role in the enactment of the Kennedy-Landrum-Griffin law,' the statement said.

"There is a lessening of international tensions and a chance to move once more on some long overdue legislative needs here at home. There is a chance to move further on the relations we built in the last ses-

sion of the California Legislature, around the fights on Proposition 18, the Unemployment Bill and the Labor Reform Bills. These are opportunities which we can help develop around specific legislative and political issues.'

"Actions listed. In specific actions implementing its broad political goal, the meeting voted:

"To recommend a \$1 legislative and political assessment to all California locals this year, half to go to the locals and have to the district councils.

"To fight for repeal of the Kennedy Act and to to back up unions embroiled in economic beefs or legal prosecution under the law.

"To support the Forand Bill extending free medical service for persons coming under the Social Security [fol. 425] Program.

"To support the Negro community on civil rights issues and to enlist Negro support on labor issues such as the Kennedy Act.

"To back California teachers facing a witch-hunt initiated by the House Un-American Activities Committee.

"To support the Aid for Needy Children program which is undergoing attack by business groups and anti-labor newspapers.

"To urge an end to the private disability insurance plans which are in effect subsidized by the State plan out of worker contributions.

"To back the International Union of Mine, Mill and Smelter Workers—"

[fol. 426] Mr. Gladstein: On page 4, with Your Honor's permission, there is an article, this one of three, and this one is headed "fight on Kennedy Law Mapped at Fresno," and it is date-lined Fresno, and it is as follows:

"A fighting policy of seeking repeal of the Kennedy Labor Act and of rallying all possible opposition to the law's union-busting provisions was adopted January 23rd by the ILWU Northern and Southern California joint district councils. A statement adopted by the joint

meeting warned that the Labor Department is developing a vast bureaucracy to spy upon the internal operations of unions——”

“... Labor Department is developing a vast bureaucracy to spy up on the internal operations of [fols. 427-427a] union and that traditional and necessary union weapons of strike and boycott are greatly circumscribed, as the San Francisco Lithographers have already found out. The statement declared that the ambiguous position of the AFL-CIO leadership made is easier for the McClellan Committee and the newspapers to do a job on labor and pave the way for passage of the anti-labor law. Outlining a specific action program, the policy statement, No. 1, commends Senator Morse and the fifty-two Congressmen who had the courage to oppose the bill in the final vote. 2, censures those ‘liberals’ who supported the bill on final vote on the theory that some legislation line was necessary; 3, endorses the position taken by the International in its correspondence with Secretary Mitchell. We believe Section 504 of the Act to be unconstitutional and union-busting, and believe it should be fought by all possible means. No. 4 recommends that ILWU locals continue to support the unions in their economic beefs as we have always done and that we fight by every means at our disposal against any encroachment by the law upon our normal trade union activities. No. 5 recommends that ILWU join wherever possible with other unions in order to develop and carry on a united opposition to the law.”

And No. 6 deals with another subject so I do not mention it.

[fols. 428-430] Mr. Gladstein: Q. Mr. Bridges, I want to ask you a few questions about your acquaintance with Mr. Brown. To your knowledge, has he run for public office?

A. Yes.

Q. Does Mr. Brown have a—First of all, are you ac-

quainted with whether or not he has a reputation on the waterfront of San Francisco—

Mr. Poole: Just a moment—Pardon me.

Mr. Gladstein: Q.—waterfront of San Francisco, as to whether he is a law-abiding citizen?

The Court: Are you acquainted? Yes or no, now, whether he has a reputation or not.

The Witness: Yes.

Mr. Gladstein: Q. Is his reputation among San Francisco waterfront longshore workers and so on for law-abidingness good or bad?

A. I would say good.

Q. Does he bear, to your knowledge, a reputation among his fellow longshoremen as to whether he is or has been a good, honest union man?

Mr. Poole: Just a moment. I object to that as being incompetent, irrelevant, improper examination.

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[fol. 431] Mr. Poole: That is quite proper. Every person charged with crime has a right to put in his general reputation on being a law-abiding citizen. But here whether he is thought of or is a good or a bad union member is not the point. He can be in their view the best—I don't know what they think of him. He can be in their view the best, but if he is a member of the Communist Party and serves on the executive board of a labor union and does so wilfully and knowingly, he has violated this law, and therefore, this cannot have any bearing upon it whatsoever.

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The Court: I will sustain the objection.

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[fol. 432] ROBERT ROHATCH, having been previously sworn, resumed the stand and testified further as follows:

Direct examination.

By Mr. Gladstein:

Q. Mr. Rohatch, I am putting you on as my witness now, though my first question or two will relate to testimony that was given when you were on the stand last.

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On page 108 of the transcript this appears in the [fol. 433] proceedings of March 29th. Mr. Rohatch, you were being questioned by me and your attention was addressed to the—was being focused on the publicity committee, and I put this question to you:

“Q. The Publicity Committee, being a member of the Publicity Committee, does that have anything to do with being on the Executive Board? Is it the same or is it different?”

And you gave this answer:

“A. No, it's separate. The Executive Board is the governing body of the union and the Publicity is a three-man committee that writes down the information necessary to carry on the union work.”

Now, is there anything in that answer that you gave that is inaccurate?

A. Yes, the statement that I made about the Executive Board, the Executive Board is a recommending body. They recommend to the membership and the membership can adopt it, amend it, reject it or just plain throw it out.

Q. I see that on page 111, just a little after the testimony that I have directed your attention to, I read to you from Section 10, Subdivision A, of your local union constitution—and I don't bother to re-read it, but in pertinent part it defines the Executive Board and says that it shall be the advisory board of the local and that they shall have the power [fol. 434] to adopt such measures as are deemed necessary

from time to time for the good and welfare of the local, subject to the approval of the membership.

Was that the practice?

A. That's correct.

Q. And just as bearing on the same thing, when you were on the stand and Mr. Poole was questioning you earlier than today, page 21, he asked you this question:

"Q. The question, I believe, Mr. Rohatch, was, what is the function of the Executive Board of Local 10 of ILWU?"

You gave this answer: "A. The function of the Executive Board is, they usually handle all the affairs, prior to going to the membership. They make certain recommendations to the membership. They are not a final say; they just make recommendations. You know what I mean."

That is a correct answer?

A. That's correct.

Q. And on page 85 and 86, a little prior to the portion I think I called your attention to, I put this question:

"Q. Have you——"

Mr. Poole: What page?

Mr. Gladstein: The bottom of 95, Mr. Poole.

"Q. Do you have—have you had during the indictment [fol. 435] ment period or any time in your experience, Mr. Rohatch, any situation where somebody from up above gives order as to who runs the union or anything like that?

"No, the union is strictly run by the rank and file." That you want to leave as a correct answer?

A. That's correct.

Q. On page 107 a question was put:

"Q. All these people running for office in that one year, or are these two copies? Oh, you had a run-off election, is that it?"

"A. Yes. We got a real rank and file union. We are not run by a few people, you know."

And that answer is correct?

A. It is a true statement.

Mr. Gladstein: Now, Your Honor will recall that I said that from the minutes of the Executive Board I will read in full three or four. I decided that the one I read is adequate to give the flavor and the pattern of the meetings. I did, however, want to keep my word to read to the jury everything that the minutes show that Mr. Brown said or did so that they will know just everything that he said or did while on the executive board, and so there are some brief excerpts that I would like to read now.

The Court: All right.

[fol. 436] Mr. Gladstein: I suspended—Mr. Leonard is keeping me straight on this—at the meeting just before July 28, 1960, so that July 28, 1960 minutes of the Executive Board of Local 10 are next.

On page 1, about two-thirds of the way down the page, there is a letter. I read as follows:

"Letter from the San Francisco Little Summit Conference advising us of a meeting which will be held Saturday, July 30, 1960 from 1:00 p.m. to 4:00 p.m. at the Women's City Club, 465 Post Street. Copy attached to minutes.

"Moved, seconded and carried to send the two delegates who previously attended meetings of this organization; plus one of the officers to this meeting."

I read that because there is something directed in the prosecution's case on that subject, Your Honor.

On page 2: "A copy of the Boycott Committee's report was read by the Secretary concerning their Civil Liberties demonstration in Los Angeles at the Democratic Convention.

"Moved, seconded and carried to adopt the written report with the noted corrections attached to these minutes."

And attached to the minutes there is the report of July 14, 1960:

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[fol. 437] "Dear Brothers:

"There were 20 longshoremen who took part in the Civil Liberties demonstration in Los Angeles Sunday, July 10th. Their names are listed at the end of this report. The Boycott Committee, through collection sheets and a pay line collec Saturday July 9th, collected \$214.91 for delegation expenses. Together with Local 6 we had 43 riders on the bus to Los Angeles which left Saturday night at 9:20 p.m. A number of other longshoremen drove their cars to Los Angeles.

"The men arrived at Local 26's Offices in Los Angeles at about 7:30 a.m. Sunday. Lou Sherman, Secretary, and Tom Chapman, Business Agent, welcomed the delegation and took us all to a fine breakfast at 9:30 a.m. The men, approximately 50 in number, turned to at 1:00 p.m. for the demonstration in front of the Sports Arena in Los Angeles. About 4,000 marched in this line. Several longshoremen, Shelley Turpie and Bob Marshall, acted as monitors. Our reception was most friendly. After hearing Chairman Paul Butler and Martin Luther King, we returned to Shrine Auditorium.

"There were about 7,000 people present. We heard Senators Kennedy, Humphrey, Lehman and [fols. 438-439] Symington. Congressmen Adam Clayton Powell, James Roosevelt, Diggs of Detroit and Inouye of Hawaii also spoke to the meeting. A letter from Mrs. Eleanor Roosevelt praising the Marchers for Freedom was read.

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[fol. 440] Mr. Gladstein: Well, then the next one is September 22—sometimes we have to look at the attachments, Your Honor. I see on page 2—this was motion carried—

"Letter was read from the Little Summit Conference requesting us to circulate petitions for peace which was enclosed in the letter. (Copy attached.)

"Motion by Brown, seconded and carried, that the Executive Board members help circulate the petitions and that we also publish this information in our bulletin."

Now, that petition is attached. It is very brief but I—There is a letter from a lady attached to it and the petition—We'll pass it. Let's see if there's anything else about Mr. Brown at that meeting.

[fol. 441] Yes, there is a motion on page 3 by Mr. Brown, seconded and carried:

"We request Brother Drobshoff to relinquish his position as gang boss. Should he fail to do so, this Executive Board shall then press official charges for action for his unbecoming behavior as a union man." I think that's all in that.

I don't find in the next minutes any specific reference to Mr. Brown.

On the 15th of September 1960 the minutes show as follows:

"The Secretary read the minutes of the officers' and Board of Trustees' special meetings of August 31 and September 1, 1960.

"The Chairman also informed the Board of the past actions of the officers, the board of trustees, and the membership which led to these recommendations.

"Motion made and seconded to approve the officers' and Board of Trustees' special meeting minutes of August 31 and September 1, 1960.

"Amendment: (By Brown) That we discuss these recommendations seriatim.

"Amendment to amendment: (By Hunter) To discuss and vote on these recommendations one by one.

"Vote on amendment to amendment carried."

[fol. 442] On page 2 it says: "Special Board of Trustees, September 1, 1960:

"Motion: That, effective October 1, 1960 the President of Local 10 be paid a weekly salary computed at the gang boss rate of \$3.02 per hour. Present gross weekly salary will be \$163.31.

"Other full-time officials of the Local shall be paid a weekly salary computed at the winch drivers' rate of \$2.97 per hour. Present weekly gross salary will be \$160.38.

"That the President of the Local be allowed a maximum of \$1,200 per year and other full-time officials of the Local be allowed a maximum of \$700 per year for reasonably necessary vouchered expenses incidental to the job.

"Monies expended for these expenses shall be accounted for in writing to the bookkeeper and reported to the Board of Trustees monthly.

"The Board of Trustees shall review the expenditures and shall have the right to disapprove any item or items deemed by it not to be a proper expense incidental to the job.

"That all other lump sum unvouchered expenses be discontinued as of October 1, 1960.

"After a long and detailed discussion which covered [fol. 443] all phases of the recommendation, it was

Moved (by Brown), seconded, to adopt this recommendation of the officers and Board of Trustees."
But, "Vote on the motion lost."

The meeting October 13, 1960—

• • • • •
"Brothers James, Tucker and Walker volunteered to serve on the subcommittee to process the visitors."

Q. Does that refer to visiting longshoremen, Mr. Ro-hatch, or just not union people who were visiting? How was that?

A. That was referring to the visiting longshoremen from other ports.

Q. Then the minutes shows:

"Motion by Brown, seconded, that the subcommittee be guided by the quota set down by the Executive Board and membership. All others are to work off the floor when granting full work privileges.

"Amendment (By Stern) that we instruct the sub-

committee to take in the usual quota of one percent and any additional brothers from other ports will be [fol. 444] dispatched in accordance with the rules of our Local. Visitors must show their cards to the dispatcher before being dispatched.

"After a long discussion it was moved, seconded and carried to close debate.

"Vote on the amendment carried."

The meeting of February 9, 1961:

"Resolution signed by 300 members reading as follows:

"We, the undersigned members of ILWU Local 10 believe that the 'B' men should be permitted to complete any job to which they are dispatched."

"Motion (By Brown) to concur in the resolution."

"Amendment (By Callaghan) that when work picks up in the port the 'B' men finish the job."

"Amendment to amendment: That from May 1 to September 30 'B' men be permitted to finish jobs in the hold."

"Amendment to amendment carried."

"Moved (By Brown) and seconded and carried to instruct the officers of Local 10 to fight for leaves of absence for the 'B' men in the Local Labor Relations Committee. This is to apply only between now and May 1st. If this is not successful, then we call upon the Coast committee to use their good offices to assist the [fol. 445] local officers in their efforts to get leaves for the 'B' men."

What did that refer to, Mr. Rohatch?

A. Well, it's during a slow period where these men have to be available and sometimes they would have a chance to work outside; during the slow period, to alleviate the situation for the rest of the 'B' men or maybe for the family—they may have a family problem or they might have five or six kids and he's able to make a living outside, where the work slows down it is all right for the 'A' men but for the permit men or the "B" men it's a little rough.

Q. On the second page of the minutes of that meeting

there is a motion by Brown which was seconded and carried reading as follows:

"That the officers will meet with the chief dispatcher and assistant chief dispatcher to discuss problems of the hiring hall and to bring recommendations back to the Executive Board."

Can you tell us what that expression "hiring hall" refers to?

A. I didn't get that. Will you repeat that question?

Q. The motion was that the officers will meet with the chief dispatcher and the assistant chief dispatcher to discuss problems of the hiring hall and to bring recommendations back to the Executive Board. There was a motion by Brown and it was seconded and carried.

[fol. 446] A. Well, that was to discuss the dispatching rules and ways they can have of improving them or improving the method of dispatching in the hiring hall.

Q. The hiring hall is the place through which the men are rotated for the employment opportunities?

A. Equal opportunity, that's right.

Q. On the third page there is a motion by Brown, seconded and carried:

"That the officers of Local 10, after consulting with the International officers, shall issue a proper statement in relation to Mayor George Christopher's recent blast at the students and the support of the tactics of the Un-American Committee."

And the minutes of February 23, 1961, it appears at the bottom of the first page, there is a motion by Brown, seconded and carried:

"That the officers bring back a schedule of 'B' men's meetings to the next Executive Board."

On page 2 there is action as follows:

"President Erkkila reported on the problems under the new Modernization and Mechanization contract
_____"

No, no, that's irrelevant. I will not read that.

About one-third of the way down the page there is a motion by Brown which was seconded and carried:

"That the members of the Sports Committee and all [fol. 447] other interested people, including the band representatives or any other activities, meet with the officers at the earliest possible time."

The union has a band, has it?

A. A good band.

Q. A good band.

A. Yes.

Q. Sports Committee—Does the union participate in some leagues of some kind?

A. Yes. We have a baseball team and we had hopes of organizing a bowling and a golfing team.

Mr. Gladstein: Q. How long have you known Mr. Brown? [fol. 448] A. Oh, I guess I have known Brother Brown since I came down on the waterfront in 1937. So I have known him approximately since that time, I guess.

Q. Has it ever come to your attention that he ran for public office?

Mr. Poole: Just a minute. I object—I will withdraw the objection. I'm sorry.

The Witness: Well, he has run for Governor of the state.

The Court: Has he ever run for public office?

The Witness: Yes.

The Court: That's all the question is.

The Witness: Yes.

Mr. Gladstein: Q. And what offices has he run for?

Mr. Poole: Object to that as being irrelevant, may it please the Court? I don't see how it is relevant.

Mr. Gladstein: Well, all right.

Q. Is it understood these are public offices I asked you about?

A. That's correct, sir.

Q. Has he from time to time, to your knowledge, asked for the support of the union membership?

A. Yes.

Mr. Poole: Objection. Irrelevant; immaterial.

Mr. Gladstein: It is just that I am—I am not going to [fol. 449] ask—

The Court: I will sustain the objection. I don't think it is relevant.

Mr. Gladstein: Q. Has the union ever endorsed Mr. Brown in any of these political campaigns?

A. Yes.

Mr. Poole: Object. Incompetent, irrelevant and immaterial.

The Court: The answers may go out.

Don't answer, Mr. Rohatch, with these objections coming in. Let me rule on it.

I will sustain the objection.

Mr. Gladstein: Q. Does Mr. Brown have a reputation—is he generally considered by the members of your union to be a Communist?

Mr. Gladstein: Q. Does he have the general reputation on the waterfront of being a communist?

[fol. 450] A. I would say it was no—it was an open secret; everybody knew about it.

Q. It was an open secret, you say?

A. That's right.

Q. Everybody knew about it?

A. Yes.

Q. Has he ever, then, denied this reputation of being a communist?

Mr. Poole: Just a moment, please, I will object to that question.

The Court: Sustained.

Mr. Gladstein: Q. Mr. Brown, to your knowledge, does he have any reputation among his fellow longshoremen on the waterfront as to whether he is a law-abiding citizen?

A. Well, to the best of my knowledge, I think—

The Court: No, the question is, do you know whether he has a reputation. You can say yes or no.

The Witness: Yes. Yes.

Mr. Gladstein: Q. And is that reputation good or bad, Mr. Rohatch?

A. From what I see, it was good as far as the union man is concerned.

Q. As far as the union man who knows him and whom he knows?

A. Yes.

Mr. Gladstein: I think that is all.

[fol. 451] Cross-examination.

By Mr. Poole:

Q. About one question, Mr. Rohatch. The Executive Board of ILWU Local 10 carries on the business of the Local, subject to the approval of the membership, isn't that correct?

A. They are——

Mr. Gladstein: What is that?

The Witness: No, I wouldn't say——

Mr. Poole: The question is, if there is any doubt about it, the Executive Board of ILWU Local 10 carries on the business of the Local subject to the approval of the membership.

A. No, that is not so.

Q. It is not correct?

A. No. It is an advisory board.

Q. Now, Mr. Rohatch, when you were here the other day and testified, I understood you to say to the contrary. Let me direct your attention, if I may, to page 21 of the transcript, the testimony, and in particular page 19.

If I may approach the witness, Your Honor.

The Court: Surely.

Mr. Poole: Q. You see the question on page 19 of the transcript and the answer following.

The Court: You mean line 19 on page 21?

Mr. Poole: Line 19 on page 21, Your Honor.

A. (Witness examining transcript.)

[fol. 452] Q. You have seen it?

A. Yes. I have. I see this. But actually, Mr. Poole, what it means by that, recommendations come to the union, like letters or correspondence or something that may come up, for their concurrence. They either concur in it or amend it or even disapprove it, and then send it on for the membership. But, however, it is not final until it reaches the membership.

Q. Oh, yes. I say subject to the—

A. Approval.

Q. —approval of the membership. My question was—and by “business,” I mean the business of receiving—

A. Correspondence.

Q. —requests from the members of the union, making recommendations about work schedules, the A and B classes and that sort of thing. That goes to the Executive Board first, doesn't it?

A. Correct.

Q. And then the Executive Board will vote on it and decide what it is and then they pass on their resolution or their recommendations to the membership?

A. To the membership for their adoption.

Q. And the membership may adopt them or reject them.

A. Reject, that's right.

Q. But it is all funneled through this Executive Board, isn't that correct?

[fol. 453] A. Correct.

Q. The business of the union is funneled through the Executive Board subject to the members' final approval?

A. It is a channel of procedure that we use.

[fol. 454] AFTERNOON SESSION, WEDNESDAY, APRIL 4, 1962

REINO ERKKILA, called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: State your full name, your occupation and your address to the Court and jury.

The Witness: Reino Erkkila, longshoreman, and I live at 161 Beaver Street, San Francisco.

Direct examination.

By Mr. Gladstein:

A. Mr. Erkkila, you have been a member of Local 10 of the longshore local in San Francisco for many years, have you not?

A. Yes, I have.

Q. And during various of those years you have served in a variety of capacities, as a member of the Executive Board, President and numerous other offices, that is right, isn't it?

A. That is right.

Q. There has been testimony in this case concerning the conduct of elections between the years 1959 and 1961.

(To the clerk) Will you mark these for identification, please, in that order, Mr. Clerk?

While that is happening, I may say we have had testimony, Mr. Erkkila, to the general effect that when you [fol. 455] have your annual elections the City Hall voting machines are hired by the union and there has been a description of how the balloting takes place, that's true, isn't it?

A. I believe. I didn't hear all of it.

The Court: He hasn't been in court.

Mr. Gladstein: Q. It is true that the machines are hired?

A. That is correct. The machines are rented from the City and County of San Francisco.

Q. And you have participated in the voting in 1959, 1960 and 1961?

A. As a voter and candidate.

Q. You would recognize, I take it, that you were shown

then sample ballots that were used on during the 1959-1960 elections?

A. Pardon?

Q. You would recognize sample ballots that were used during those elections in 1959 and 1960?

A. Oh, yes.

The Clerk: Defendant's Exhibits F, G, H and I, marked for identification.

(Sample ballots referred to were marked Defendant's Exhibits F, G, H and I, respectively, for identification.)

[fol. 456] Mr. Gladstein: Q. Mr. Erkkila, I had you the four exhibits for identification whose letters are as the clerk stated a moment ago, and I will ask you to examine them one after the other and just answer yes or no as to whether you are able to tell us if they appear to be true samples of the ballots that were voted on by the longshore union, Local 10, in San Francisco for the dates which they respectively bear.

A. For the primary election for the year of 1959 and the primary election—I mean, runoff election for the year 1959, I think they are actual copies of—I don't know whether they are official ones from the union office or not, but they are copies of—I don't know the source.

Q. Are you referring to the figures written in, that you don't know whether those represent the actual votes?

A. I presume they do.

Q. Do you recognize the printed matter as being ballots?

A. They are, yes, they are sample ballots.

Q. All right. Now there are two others. Would you tell us whether you recognize those?

[fols. 457-461] A. Primary election of 1960 and runoff election of 1960.

Q. All right.

A. Yes, they are the same thing.

Q. Very well.

I offer these in evidence, if Your Honor please.

[fol. 462] The Court: You asked Mr. Rohatch, "Are these the official records?" and he said, "Yes." That is it—the computation as set forth there.

No, I think it is immaterial. I will sustain the objection.

Mr. Gladstein: Q. Now, Mr. Erkkila, you have served on the Publicity Committee of the local union as well as in the other capacities you have mentioned, that is true, isn't it?

A. Yes, I have.

Q. Would you tell us, please, Mr. Erkkila, is it true or is it not true, that when serving on the Publicity Committee it is a uniform requirement that the president of the union, whoever he may then be, must approve the material that goes out in the Local 10 Longshore bulletin?

A. That is correct. He reads it over before it is put out and published.

Q. This was a practice that you followed when you were president?

A. That is right.

Q. And this is a practice, to your knowledge, which during [fol. 463] the time you served on the Publicity Committee and anyone else was president, was followed as well?

A. That is correct.

Mr. Gladstein: Mark this for identification, please.

(Longshore Bulletin was marked Defendant's Exhibit J for identification.)

Mr. Gladstein: Q. I show you, Mr. Erkkila, a bulletin bearing the date of November 6, 1959, marked Defendant's Exhibit J.

Mr. Gladstein: Q. Please examine Defendant's exhibit [fol. 464] J for identification and state if you recognize it to be or appears to be a bulletin issued on or about the date it bears, written by yourself, Mr. Erkkila, after receiving approval from the then president of the local union to publish it?

A. That is right. This bulletin is my bulletin at that time, yes, sir.

Q. Do you remember who the president was, the president of the union was on that date, who approved it?

A. I believe Martin Callaghan was president here—'59—that is the date of the bulletin.

[fol. 465] Mr. Gladstein: Q. Mr. Erkkila, these bulletins, when they are—what do you call this—what is that process, mimeograph?

A. They are mimeographed, yes.

Q. What is done with them, with the bulletins?

A. With the finished product?

Q. Yes.

A. It is distributed to the membership through our [fol. 466] dispatching hall and on the ships and the docks of the waterfront.

Q. Is it the purpose to provide as many—all, if possible, of the members with such a bulletin?

A. Well, I think we run off around 3,500 and our membership is around 4,000 working membership, so we try and cover everyone.

Q. And this particular one that I have shown you, Defendant's J for identification, I take it that as well as the others was published in those quantities and distributed in the manner that you have said?

A. I think so.

Mr. Gladstein: I will renew my offer, Your Honor.

The Court: I will sustain the objection.

Mr. Gladstein: All right.

Q. Now Mr. Erkkila, you have known the defendant, Archie Brown, for some time, haven't you?

A. Yes, sir, I have.

Q. Approximately how long?

A. About 25 years.

Q. Have you sat in Executive Board meetings with him?

A. Yes, I have.

Q. Have you ever known him to advocate anything illegal or against the law?

Mr. Poole: Just a moment. Your Honor, if Mr.—

[fol. 467] The Court: I will sustain the objection. If we are going to reputation, let's go.

Mr. Gladstein: Q. Based on your knowledge of him and what others say about him on the waterfront, are you familiar with his reputation for law-abidingness?

A. Somewhat, I believe.

Q. Would you say that that reputation was good or bad?

A. It's good, as far as I know.

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WILLIAM H. CHESTER, called as a witness by the defendant, being first duly sworn, testified as follows:

The Clerk: State your full name, your occupation and [fol. 468] your address to the Court and jury.

The Witness: My name is William H. Chester. I am Northern California Regional Director for the International Longshoremen's and Warehousemen's Union. I reside at 2715 Monterey Street, San Mateo, California.

Direct examination.

By Mr. Gladstein:

Q. Mr. Chester, you have been a longshoreman by occupation for many years before taking union office, that is true, is it not?

A. That's right.

Q. Approximately when did you commence such work on the waterfront?

A. 1939.

Q. Here in San Francisco?

A. That's right.


Q. You have been a member of the local union since that time, have you?

A. Well, I was first a member of ILWU Local 122 which later merged with ILWU Local 10. That was during the war.

Q. What was Local 122?

A. That was a bargemen's union.

MICRO CARD 22

TRADE MARK 

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1965



Q. Now you have held membership in Local 10 since when?

A. 1942.

Q. Have you held office in that local union?

[fol. 469] A. Well, I have been a member of the Executive Board of that, of the Local 10, for a number of years; also served as chairman and secretary of the Board of Trustees of Local 10.

Q. Over a period of how many years, approximately, Mr. Chester?

A. Oh, I would say over a period of the 15-16 years.

Q. Do you now hold the office that you mentioned, which is an office of the International Union, is it?

A. Yes. I have held this office for the last 12 years.

Q. Between the years 19—well, say during the years 1959, 1960, 1961, what union offices did you hold? Well, you were the Regional Director?

A. Yes.

Q. And you were also a member of the Executive Board of Local 10?

A. Right.

Q. In your service on the Executive Board of Local 10, did you run for election each year?

A. Yes.

Q. Now, do you know Mr. Archie Brown, the defendant?

A. Yes.

Q. How long would you say you have known him, Mr. Chester?

A. Oh, I would say close to 20 years.

Q. You have met with him frequently on the Executive Board together?

[fol. 470] A. We meet the first and third Mondays of every month.

Q. And I take it by that that you and he are both pretty faithful in attendance, in general?

A. Well, we don't miss very many meetings.

Q. You don't usually miss very many? You have heard him speak and you observed him at this meetings, have you, at these Executive Board meetings—you have heard him speak and you have observed his conduct?

A. Yes.

Q. Have you ever known him to propose or advocate anything illegal?

Mr. Poole: Just a moment. I will ask that this question be—I will object to this question and—

The Court: Sustained.

Mr. Gladstein: Q. Mr. Chester, are you acquainted with the reputation of Mr. Archie Brown among the longshoremen and waterfront workers of the Coast of San Francisco with respect to lawabidingness?

A. Well, he is known among the members as a good longshoreman, a good worker—

Mr. Poole: I ask the answer be stricken as completely irrelevant—

The Court: Are you familiar—you may answer that yes or no. Are you familiar with his reputation?

Mr. Gladstein: His reputation—

[fol. 471] The Court: His reputation for lawabidingness?

The Witness: Yes.

Mr. Gladstein: Q. Would you say that that reputation is good or bad?

A. As far as I know, it's good.

(The following proceedings were had outside the presence of the jury.)

Mr. Gladstein: There were, Your Honor, some offers of proof that were made and—or perhaps some questions that were asked to which objection was made and the objections were sustained, and in two instances there were Defendant's Exhibits for identification, and because of the form, which Your Honor observes, in which they are, I should like leave to read them into the record and then withdraw these as exhibits because I assume Your Honor's ruling will remain the same.

[fol. 472] The Court: Yes, surely.

Mr. Gladstein: These exhibits are Defendant's Exhibits D and E for identification.

(Defendant's Exhibit D for identification was read into the record as follows):

"Congratulating International Longshoremen's and Warehousemen's Union and Pacific Maritime Association for Consummation of Special Agreement on Mechanization and Modernization.

"Whereas, The International Longshoremen's and Warehousemen's Union, representing the dock workers of the Pacific Coast, and the Pacific Maritime Association, representing the employing steamship and stevedoring companies, have reached a five and one half year special agreement on Mechanization and Modernization; and

"Whereas, This agreement for the first time anywhere insures workers against layoffs, individual speedup and economic insecurity which ordinarily accompanies mechanization and modernization; and

"Whereas, The agreement at the same time permits and encourages the employing companies to introduce labor-saving machinery and devices and to institute more efficient methods of cargo handling without individual speedup; and

[fol. 473] "Whereas, Such agreement logically portends faster movement of cargo and quicker ship turnaround, to the end that more cargo will be attracted to waterborne carriers through San Francisco and other Pacific Coast ports to the general benefit of these communities; and

"Whereas, San Francisco, as a key part of the greatest natural harbor in the world, is largely dependent upon its waterfront prosperity; and

"Whereas, The parties to the agreement have gone far toward solution of one of the most pressing problems of a difficult era; now, therefore, be it

"Resolved, That the City and County of San Francisco, through this Board of Supervisors, should and does hereby take official notice of this epochal achievement brought about by the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association through the processes of peaceable collective bargaining, and extends to these parties its hearty congratulations; and, be it

"Further Resolved, That suitable engrossed copies of this resolution be presented to the International Longshoremen's and Warehousemen's Union and to the Pacific Maritime Association.

"The foregoing Resolution was introduced by supervisor [fol. 474] Joseph M. Casey and adopted by unanimous vote of the Board of Supervisors of the City and County of San Francisco at its regular meeting on Monday, November 14, 1960.

"C. A. Ertola,
President of the Board of Supervisors.

"Robert J. Dolan,
Clerk of the Board of Supervisors.

"Geo. Christopher,
Mayor of the City and County of San Francisco."

(Defendant's Exhibit E for identification was read into the record as follows):

"ASSEMBLY, CALIFORNIA LEGISLATURE, 1961 REGULAR SESSION RESOLUTION"

"Relating to congratulating the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association for consummation of a special agreement on mechanization and modernization.

"By Honorable John A. O'Connell, 23rd District; Honorable Phillip Burton, 20th District; Honorable John A. Buserud, 22nd District; Honorable Milton Marks, 21st District; Honorable Edward E. Elliott, 40th District; Honorable Edward M. Gaffney, 24th [fol. 475] District; Honorable Augustus F. Hawkins, 62nd District; Honorable John T. Knox, 11th District; Honorable Charles W. Meyers, 19th District; Honorable Carley V. Porter, 69th District, Honorable William Byron Rumford, 17th District; Honorable Vincent Thomas, 68th District; and Honorable Jerome R. Waldie, 10th District.

"Whereas, The International Longshoremen's and Warehousemen's Union, representing the dock workers of the Pacific Coast, and the Pacific Maritime Association, representing the employing steamship and steve-

doring companies, have reached a five and one-half year special agreement on mechanization and modernization; and

"Whereas, This agreement for the first time anywhere insures workers against layoffs, individual speedup and economic insecurity which ordinarily accompany mechanization and modernization; and

"Whereas, The agreement at the same time permits and encourages the employing companies to introduce labor-saving machinery and devices and to institute more efficient methods of cargo handling without individual speedup; and

"Whereas, Such agreement logically portends faster movement of cargo and quicker ship turnaround, to the end that more cargo will be attracted to waterborne [fols. 476-477.] carriers through San Francisco and other Pacific Coast ports to the general benefit of these communities; and

"Whereas, The parties to the agreement have gone far toward solution of one of the most pressing problems of a difficult era; now, therefore, be it

"Resolved, That the Assembly of the State of California does hereby take official notice of this epochal achievement brought about by the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association through the processes of peaceable collective bargaining, and extends to these parties its hearty congratulations; and, be it further

"Resolved, That suitable prepared copies of this resolution be presented to the International Longshoremen's and Warehousemen's Union and to the Pacific Maritime Association.

"House Resolution No. 109 read, and adopted unanimously March 7, 1961.

(Seal) The Great Seal of The State of California.

"(Signed: Ralph M. Brown, Speaker of the Assembly

"(Attest: Arthur A. Ohnimus, Chief Clerk of the Assembly")

[fol. 478] (The following proceedings were had in the presence of the jury.)

Mr. Gladstein: The defense rests, Your Honor.

Mr. Poole: The Government rests, Your Honor.

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[fol. 479] COUNSEL'S REQUESTS OF JURY INSTRUCTIONS AND COLLOQUY THEREON

Mr. Gladstein: For the record, there appears in 27 Federal Rules Decisions, commencing at page 46, a series of jury instructions and forms. The defense requests and points out that the prosecution also did request, that instruction designated 2.01, found on page 48, entitled, "Presumptions of Innocence-Burden of Proof-Reasonable Doubt" be given.

The Court: It is my intention to give it.

.

Mr. Gladstein: Let us put it on the record that we are asking for 4.01 and Mr. Poole is reserving whether he is going to agree or not, and the Court, I guess, is going to go to something else now.

The Court: Let's stay on the subject of intent, knowingly, and how it fits in:

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[fol. 480] Mr. Gladstein: Can we make that a matter of record, that as to Instruction 7.06, the Court apprises us that it will give the first two paragraphs of that instruction as it appears on page 91 of 27 Federal Rules Decisions. The defense requests that in giving that instruction, the Court also give the third paragraph which appears in that instruction. The instruction that we request reads as follows:

"You will note that the acts charged in the indictment are alleged to have been done knowingly.

"The purpose of adding the word 'knowingly' was to insure that no one would be convicted for an act done because of mistake or inadvertence or other innocent reason.

"With respect to the offense charged in this case, specific intent must be proved before there can be a conviction."

The Court: Referring to 7.08, page 92 of Federal Rules Decisions, Volume 27, as referred to a few moments ago by Mr. Gladstein, "unlawfully," I intend to define "unlawfully" as follows:

"You will note that the acts charged in the indictment are alleged to have been done unlawfully. 'Unlawfully' means contrary to law, hence to do an act unlawfully means to do willfully something that is [fol. 481] contrary to law. An act is done willfully if done voluntarily and purposely, as distinguished from accidentally or negligently."

Mr. Gladstein: Now in that connection we request that as a part of the same instruction, the Court also advise the jury as follows:

"An act is done willfully if done voluntarily and purposely and with the specific intent to do that which the law forbids; that is to say, with bad purpose, either to disobey or to disregard the law."

The Court: I have already ruled on the specific intent, my feeling in that regard.

Mr. Gladstein: You feel, Judge, that the last portion, the bad purpose, is connected with specific intent? Let me put it this way: I will ask that that be given, that what I have just read be given either in that form or in the following, to-wit:

"An act is done willfully if done voluntarily and purposely; that is to say, with bad. . . ."

No, let's see. Let me withdraw that.

"An act is done willfully if done voluntarily and purposely to do that which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law."

[fol. 482] The Court: I do not believe that this statute, that is, 504, that we are concerned with here, requires a bad purpose or evil objective.

Mr. Gladstein: The record will show that the defense requests Instruction 7.10, reading as follows:

"You will note that the acts charged in the indictment are alleged to have been done willfully. An act is done willfully if done voluntarily and purposely and with the intent to do that which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law."

The Court: That is the same thing as I indicated above.

[fol. 483] Mr. Gladstein: With respect to Prosecution's Instruction No. 1 called Essential Elements of Offense and purporting to set forth a portion of the statute, we object to that because it is not an accurate statement of the statute and we think that the Court should instruct substantially as follows:

"The statute provides that no person or who is or has been a member of the Communist Party shall serve as a member of any executive board or similar governing body during or five years after the termination of his membership in the Communist Party."

Now, as far as the charge, I think that there should be a reading to the jury of the indictment. And then as to the essential elements of the offense, Your Honor, I think that the jury should be advised that they are in the indictment and the indictment should be read to them.

The Court: I think that there could be great confusion here on this five-year thing. If the charge is read as contained in the indictment, certainly that covers the charge end of it as to the statute itself. Those portions of the statute which are covered by the indictment would be quoted to the jury.

The Court: I will simply tell them, when we get down to this second portion of it, that the essential elements of the offense charged are contained in the indictment, which read [fol. 484] as follows:

Mr. Gladstein: We request that where the Court advises the jury as to the content of the law or as to what the indictment says or by virtue of the necessity of instructing the jury on the subject of the executive board, that the language of the statute be called to the attention of the jury and that they be told that it is a question of fact for the jury to decide whether or not the executive board so-called of Local 10 ILWU is to be found by the jury to have been an executive board or similar governing body within the language of the statute.

The reason in support of that, I want to say this, the evidence is so far that although the board is called "Executive Board," we have evidence to support the conclusion, if the jury is so minded, that it is not an executive board in fact, that it has no governing powers, that it is merely advisory. There is evidence in the record to that effect contained in the constitution and contained in the evidence of the witnesses. So far as I know, there is nothing to the contrary, but maybe I'm wrong about that. In any event, with that evidence in the record, the defendant should have the right to go to the jury and ask for an acquittal upon the ground that although this body calls itself "Executive Board," it is not a true executive board. At least we are asking them [fol. 485] to so find.

Mr. Poole: We have an "Executive Board" which Congress specifically denominated.

The Court: Well, I don't believe that this is going to affect their determination of this case if I instruct "or similar governing body."

Mr. Poole: Here is why I think Your Honor ought to instruct the jury as a matter of law that the entity referred to in this case is called the Executive Board as such.

The Court: That we are going to have to get to when we reach these other instructions.

Mr. Poole: Well, this is the end that we are getting to on Mr. Gladstein's position. That is why I wanted to make sure.

The Court: The defendant's proposed No. 5 raises this whole issue:

"You are instructed the Executive Board means ..."

Mr. Gladstein: The instruction I am requesting has nothing to do with the question of commerce or disruption of commerce. It has nothing to do with that. My contention now is a very narrow one and I am simply contending that in the light of the statute—

The Court: I think we have to instruct them that in the [fol. 486] light of the statute that if they find that he served on the Executive Board of the union—and that's all that is involved—then he has violated that portion of the statute.

Mr. Gladstein: In effect, you are deciding a question of fact.

The Court: I am telling them that they have to decide that he served on the Executive Board of the union. The Government has in its instruction here, that is the charge, he served as a member of the Executive Board of a labor organization.

Mr. Gladstein: So that the issue is refined, the instruction we are requesting has not heretofore been requested except in connection with the element of specific intent or of the powers of the Board to disrupt commerce. At this time, in lieu of or in addition to, and in any event quite apart from the instructions we have heretofore requested, we ask for an instruction to the jury that it is a question of fact for the jury to find on all of the evidence as to whether that body which is called the Executive Board of Local 10 was, in fact a governing body of the union or whether it was on the evidence not a governing body of the union, and that if the jury should find that the Executive Board is not a governing body of this union, that is a fact

for them to consider in determining the innocence or guilt of the defendant on the charge here made.

Mr. Poole: On the contrary, Your Honor, I think the [fol. 487] jury should be instructed by Your Honor unequivocally that the Executive Board of ILWU Local 10 referred to in the testimony here is such a body as referred to in the statute. When Congress said "Executive Board," it didn't mean a horse.

The Court: I think the statute in referring to "Executive Board"—just as it refers to specific offenses and so on—refers and does and specifically sets forth "Executive Board" as such, and I think that under the Constitution that is in evidence here, regardless of the element of powers of members of the Board or of the Board as a whole, that this is the Executive Board of the union. It functions as such and therefore the Executive Board, as the evidence indicates, is the Executive Board. I think I have to meet that and do it that way.

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Mr. Gladstein: We object to those portions of the prosecution's proposed instruction No. 2 which, as counsel has told us, come almost verbatim from the Killion case. Our objection being based upon the proposition that the record in this case does not happen to be the same as the Killion case and there is no evidence in this record to support any instruction regarding isolated or any kind of statements of the defendant showing sympathy with the Communist Party; nor is there any evidence of payment of dues or financial contributions or collecting of funds; nor the attendance of any Communist Party classes; nor any [fol. 488] evidence concerning making himself subject to the discipline of the Communist Party; nor anything to support any instruction about participating in recruiting activities on behalf of the Communist Party; nor any evidence to show that he executed orders or plans or directives or any kind of the Communist Party; nor is there any evidence that he acted as an agent, manager, correspondent, organizer or in any other capacity on behalf of the Communist Party as set forth in No. 6; nor is there anything about his being accepted, to his knowledge, as an officer or member of the Communist Party; nor is there any evidence

that he is one who has been accepted to be called upon for service by other officers or members of the Communist Party; nor is there any evidence that would justify No. 8 about conferring in behalf of any plans or enterprises of the Communist Party; nor is there anything about him speaking or in any other way communicating orders, directives or plans of the Communist Party; nor is there anything to the effect that he advised or counseled or imparted information, suggestions or recommendations to officers or members of the Communist Party; nor is there anything to support an instruction that he has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, objectives, designs of the Communist Party. There is not even word of evidence as to what those plans, objectives or designs of the Communist Party are as far as this case [fol. 489] is concerned, and I think No. 12 is misleading about participating in the activities, plans or actions.

As a whole, some of this is beyond the evidence.

Mr. Vincent: It is entirely possible, Your Honor.

The Court: And shouldn't be given for that reason.

Mr. Vincent: I just don't agree with his recapitulation of the evidence.

The Court: That is correct, but you go right down the line one at a time and—

Mr. Poole: Could we go down the line on them?

Mr. Vincent: I would say that if there is no evidence of any particular item, the jury cannot possibly conceive and use something which is not in evidence.

The Court: I don't think we should give these that are not supported by the evidence.

Mr. Poole: I am agreeable.

The Court: No. 1, for instance, paid dues or—

Mr. Vincent: There is a reference to that, yes, there is. Mrs. Thompson testified that to be elected as a delegate to the national convention you had to be a member in the Communist Party in good standing with your dues paid up to November of 1959.

Mr. Gladstein: Oh, she did? Is there any evidence that Archie Brown paid any money?

[fol. 490] Mr. Vincent: He was elected as delegate.

Mr. Poole: I think that is a reasonable inference.

The Court: He went as a delegate, according to Mrs. Thompson.

Mr. Vincent: She says you can't go if you don't pay your dues. He paid his dues. That is a very fair inference.

The Court: We haven't any evidence that he collected funds on its behalf.

Mr. Gladstein: There is not any evidence that he even paid dues, but as long as he is going to argue it, he can probably find something from which he can. He can probably say that there is something to the effect that it was the duty of a Communist to raise money.

Mr. Poole: May we do this, Your Honor. We will undertake to go through this transcript and append to each of these things a transcript reference where it may be found, and if we find anything that is not supported by the transcript, we will note that.

Mr. Gladstein: When are we going to see that?

Mr. Poole: We can't do it at this minute.

Mr. Gladstein: You mean tomorrow morning?

Mr. Poole: Yes.

Mr. Gladstein: What is the status of this proposed instruction No. 2 by the prosecution in the light of the fact [fol. 491] that they say they are going to go through the record to ask—

The Court: Well, I am not going to give anything that isn't indicated in the record. I am not going to give it just because the jury may or may not come to a conclusion. I am going to satisfy myself that there is a record reference or I am going to delete the particular items. Now, what else in No. 2 do you want to specifically note?

Mr. Vincent: Well, I think, then, if we are going to do that, Your Honor, we should add something in here on membership. They can also consider the admissions of this defendant to his membership in the Communist Party. I just took the membership definition, knowing that many of these items were not involved in the Killian case, the case in which this instruction was approved, specifically. But I think then we should tack on, and we can, Your Honor, that they consider his admissions, Mr. Brown's admissions, that

he is a member of the party as of May 23, 1960, and prior thereto.

The Court: That can be argued.

Mr. Gladstein: Suggest you ought to draw an instruction. There are standard instructions on the question of admissions of any kind.

Mr. Poole: All right, if you want to have corroboration, I think we have sufficient corroboration.

Mr. Gladstein: I don't want it.

Mr. Vincent: You said that the standard—

[fol. 492] Mr. Gladstein: Yes, there are standard instructions.

Mr. Vincent: And I think we might even have an instruction on the concession of counsel at least three times during the case that Mr. Brown is a member of the Communist Party.

The Court: Well, you must remember if you draw such, to point out the cautionary portion of it, that oral admissions are to be taken with caution.

Mr. Poole: Not counsel's admissions with precaution, though, Your Honor.

The Court: No, no, we are talking about the defendant. But he has got one on admissions. I don't know that I take it verbatim, but it is a correct statement of the law to a large extent.

Mr. Gladstein: I hope so. We always try to make it that. Judge, I think that had to do with our anticipation of possible, what I call snake-pit testimony or rattle snake testimony. Mr. Vincent knows what I am talking about.

The Court: The general statement is . . . view with caution oral admissions made outside the presence of the Court at this trial. That should be part of any admissions. All right.

Mr. Gladstein: Now would Your Honor delete so that proposed No. 1 will read as follows:

"Under our system of law, guilt is purely personal.
[fol. 493] You may not find the defendant guilty merely by reason of the fact, if you find it to be a fact, that he was a member of the Communist Party."

(Brief colloquy clarifying the language quoted above.)

Mr. Poole. Does Your Honor believe that this instruction is properly to be given in the absence of and out of context with other elements that are involved in this thing?

The Court: I intend to give the other elements. It won't be out of context.

Mr. Poole: Well, my point is this, that I am not sure I comprehend the purpose of this. Membership in the Communist Party, except that it could exist with membership on the Executive Board during the time period, of course, is not any offense here, and you are already going to tell the jury what the elements of the offense are.

The Court: Yes.

Mr. Poole: Now, this instruction simply—

The Court: Is this any different?

Mr. Poole: Just because he is a member of the Communist Party you can't find him guilty.

The Court: Just on that ground alone.

(Further discussion.)

The Court: I think it is not going to be used out in the middle of nowhere. It is going to be used out together with the other instructions. I am not one who just says, "Take all the plaintiff's instructions and then read all the [fol. 494] defendant's instructions."

Mr. Vincent: I realize that, Your Honor.

The Court: I try to sort my instructions out so they all go together, and if this is given right at the time we are talking about the Communist Party, then I think that's when they are entitled to it.

Mr. Poole: I would have no objection to it at that point, Your Honor.

The Court: That's all. And it will be given in its proper context, is what I am saying.

Mr. Poole: That is what I was getting at.

The Court: All right.

Mr. Gladstein: Then that instruction, if I understand correctly, as I have just read it will be given in context?

The Court: Yes.

Mr. Gladstein: All right. Now, No. 2. We ask that be given as proposed.

Mr. Vincent: I meant to ask Your Honor before we got off No. 1, are you going to give that first sentence, "purely

personal"? How does that fit in with the rest of the instruction? I don't quite understand what you mean.

The Court: I don't know what that means, "purely personal."

Mr. Vincent: What does it mean, Mr. Gladstein?

[fol. 495] Mr. Gladstein: Well, it means that you can't find him guilty except by reason of what he has done. That's what "personal" means. The jurors, I don't know how smart or—

The Court: I don't know that that hurts or helps. The next one, the doctrine of personal guilt as distinct from guilt by association. (Reading.) We haven't any evidence here that attempts to tie him in by association to anything....

Mr. Gladstein: There is testimony of what others said, Judge, at these meetings.

Mr. Poole: Which you put in you mean?

Mr. Gladstein: No, Mrs. Thompson testified.

Mr. Vincent: Talking about the CP meetings now. Mr. Gladstein, I believe, is referring to the CP meetings.

Mr. Leonard: Mickey Lima said this and somebody else said that at those meetings.

Mr. Poole: I don't think that is a proper instruction, Judge. The evidence on what took place at those Communist Party meetings was limited by Your Honor to a recitation to characterize the events of the meeting only for the purpose of showing his participation in them.

Mr. Vincent: And Your Honor, if he had attended this in some ambiguous capacity, as just being there, it might have something to do with association, but every time he attended something, it was either as an officer—it was always as an officer.

[fol. 496] Mr. Poole: And he was always there. There was no evidence of meetings of the party at which he was not present. So we are not trying to bring him in by what some other Communist Party member might have done. These were meetings at which the witness identified Archie Brown as present and participating.

Mr. Vincent: In an official capacity.

Mr. Leonard: But he still can't be held liable for what other people might have done at that time.

Mr. Poole: There is no evidence of what other things were done by communists outside his presence.

(Further discussion.)

Mr. Gladstein: Well, suppose the record shows first of all that in my request I'm modifying the request so that the instruction as it is now requested would read as follows:

"The doctrine of personal guilt as distinct from guilt by association or imputation is a fundamental principle of our law. It partakes of the very essence of the concept of freedom and due process of law."

The Court: Haven't I told the jury over and over again that they must find this defendant guilty beyond a reasonable doubt on the evidence concerning him, that they can't be swayed by sympathy or prejudice or bias, that they must look to the evidence concerning this defendant and this defendant alone? Isn't that implicit in all the instructions [fol. 497] on reasonable doubt?

Mr. Poole: I think it is, Your Honor.

The Court: And presumption of innocence? Isn't that implicit in all these things? I think it is.

Mr. Gladstein: You will not give that, Judge?

The Court: No.

Mr. Gladstein: Now No. 3. Your Honor has already indicated that you are ruling on that, but I would like to say that we ask the Court to instruct on this subject, whether in these precise words or not, and whether with this quantity of elements or a lesser quantity. But to save time, I just don't want to say that we want this instruction, as we do, and then say that if that is not given then we would want one that eliminates one element, but the rest, and then as a third alternative, and so forth. The point is, if I understand correctly, it would be futile for us to propose alternative instructions which reduce the content of No. 3 element by element to the point where only the first paragraph plus any mention of the matters thereafter would be contained. Am I right about that?

Mr. Poole: If I understand what Mr. Gladstein is saying, the general theory of this instruction is what he is asking the Court to give; is that correct?

Mr. Gladstein: Yes.

Mr. Poole: Which, in effect, is to the jury that they have [fol. 498] to find that in order to make out a violation, you have got to find the infiltration for the purpose of accomplishing these things, et cetera.

Mr. Gladstein: Or service on the Board for that purpose.

Mr. Poole: Or service on the Board for that purpose.

Mr. Gladstein: Yes. Or that he said something with that purpose in mind, or that he was planning or intending to do something for that purpose, and matters of that kind. Actually, I think we spell these out in a series of instructions.

The Court: Yes, separately. I think you do.

Mr. Poole: Yes.

Mr. Gladstein: All right.

The Court: I have already ruled in connection with what the evidence must show, and if I were going to give this instruction as you have set it out here, as you said earlier in our discussion, I think I would have granted the motion for acquittal.

Mr. Gladstein: All right. And No. 4, I take it, Your Honor would make the same disposition of?

Mr. Vincent: Three is denied, Your Honor?

The Court: Yes, and 4 is likewise. It is the same point, spelling it out.

Mr. Gladstein: Yes. And 5 now, in the light of our discussion [fol. 499] before and today—

The Court: Yes, we have already discussed 5 on the Executive Board. Now 5-A. Yes, that is the same again, that he was using the Executive Board service as a means of disruption of interstate commerce, or that, serving on the Board, he actually engaged in activities. This is again spelling out the evidence, so that will be denied.

Mr. Vincent: You have already covered 6, Your Honor, haven't you?

The Court: I think we have, yes, almost to the same form. I don't know that there is anything additional here. I think it is covered, so it will be refused. I think 7 is covered, almost in its language, so that will be refused. I don't see there is any additional thing there. 8. This again goes back to specific rather than general intent, I believe. I will not give 8. Refused. 9?

Mr. Gladstein: I want to modify 9, Your Honor. Line 13, the second sentence, beginning "Here, therefore," I would like that eliminated.

The Court: You mean the whole sentence eliminated?

Mr. Poole: Which one now?

Mr. Gladstein: The whole sentence eliminated so that the second paragraph of No. 9, as now proposed, would read as follows:

[fol. 500] "The general criminal intent in crimes is presumed from the criminal act itself. However, this would not be sufficient to establish the existence of specific intent," and so on and so forth.

The Court: Yes, all right. This is the general specific intent instruction and I will therefore refuse that. That's the same thing. 10 refused. 11. I am going to define the word "wilfully" so I don't believe that 11 is any help. If will be refused. I think it is practically the same thing. 12. Again we are talking about specific intent. 12 will be refused. I don't know whether you have changed some portions, but this is specific intent so it will be refused. 13.

Mr. Poole: We have an instruction on that.

The Court: This goes beyond—personal specific intent must be proved beyond a reasonable doubt. I don't think we have any statements which are . . . In fact, I don't think there is any record in the evidence on specific intent.

Mr. Vincent: And we have no unrecorded statements.

(Discussion regarding meaning of unrecorded statements.)

Mr. Gladstein: I would like to amend No. 13, Your Honor, by deleting, commencing at line 11, the words "Since personal specific intent must be proved beyond a reasonable doubt," just leave that out and begin with the word "You," with a capital Y, and ask that the balance of the instruction be given—or I should say "that which pre- [fol. 501] cedes and that which follows the portion deleted should be given."

The Court: I think this instruction goes to a statement in reference to his intent and it points out entirely the matter of intent, which the evidence in this case, the statements that we have, or whether he has been a member of

the Communist Party for 25 years—it's that sort of factual admission that is being offered here rather than anything that goes. . . . I don't want to leave any import that there is any evidence or admission that goes to intent. I think you could get one out of this book that might be better.

Mr. Gladstein: Let me further modify it, Your Honor, by deleting another clause in the first line or in the first sentence, I mean, at line 3, deleting the word "as bearing upon the intent of the defendant," so that the proposed instruction now would read as follows:

"If you come to consider a purported oral and unrecorded statement which the defendant is purported to have made and such report comes from a witness and is not admitted by defendant, you should bear in mind that even. . . ."

The Court: It is more than one witness. The police officer heard it too; whatever his name was, from Palo Alto, that particular statement.

Mr. Gladstein: That is why I deleted "only." And then [fol. 502] I say:—"and such report comes from —"

The Court: I think what you want to get is that you must view with caution statements made, and if you get that, there is a much better statement on it.

Mr. Gladstein: I think so, too. All right.

The Court: I will deny this because of. . . .

Mr. Gladstein: All right.

The Court: We have got to look in here for the one you want.

Mr. Poole: I think you get down to the one you mentioned before.

The Court: Yes, it's the common stock one, to view with caution, and it is more forceful, too.

Mr. Vincent: Then I take it the Court will give the common—

The Court: Let's find it. Let's find it before we just. . . . Because we could very clearly misunderstand what we are talking about.

Mr. Leonard: 2.11, I think is the one, Your Honor.

The Court: Yes. Should be considered with caution. Yes.

Mr. Poole: I thought you indicated earlier you were going to give that.

The Court: Yes, I thought so too, but I didn't mark which one it was. All right, 13, then, is refused. 14. Again [fol. 503] we are talking specific intent in these cases, I think.

Mr. Leonard: No, I think this refers to general criminal intent.

Mr. Poole: Well, Your Honor has already, as I recall, earlier—

Mr. Gladstein: You are going to instruct them that there must be a union of act and intent.

The Court: That is the one I am looking for.

[fol. 504] Mr. Poole: That's 4.01 and then 4.05, then 4.06 is proof of intent.

The Court: 4.05 and 6, yes. Well, proof of intent.

Mr. Leonard: This Instruction 14, Your Honor, simply says that the acts and statements from which they are going to infer the intent have got to be consistent, not only with the theory of guilt but have to be inconsistent with any other hypothesis.

Mr. Poole: What you are simply saying is that in order for a fact to be inferable from other facts, it's got to be a reasonable deduction or conclusion from that. That is covered in 4.06, and I don't think that 15 elucidates that with any additional clarity. I think that it is a very confusing statement.

Mr. Leonard: No, I think that in 4.06 you say that intent must be inferred from the circumstances. You start right out by talking about circumstantial evidence. Our proposed 14 is in essence the classical instruction on circumstantial evidence, that it must be inconsistent with any hypothesis of guilt.

The Court: Oh. Well—

Mr. Vincent: Circumstantial evidence, not intent. Isn't that a paraphrase of the circumstantial evidence?

The Court: Yes, acts or statements.

Mr. Vincent: It's not approachable on intent, that I know, [fol. 505] of.

The Court: I think we had better get a circumstantial instruction. I will put it in right after we talk about circumstantial evidence.

Mr. Poole: Circumstantial evidence is 2.02, Your Honor.
The Court: Here is what you want:

"In the case of circumstantial evidence, each fact essential to complete a chain of circumstances must be shown which is not only consistent with the guilt of a defendant but inconsistent with any other reasonable hypothesis. This must be shown to your satisfaction beyond a reasonable doubt as I have defined 'doubt' to you."

Mr. Poole: That is the situation where the case made out by the Government or the prosecution depends mainly upon circumstantial evidence, as I understand it, Your Honor. You tell the jury that where you seek to—

The Court: "There are two kinds of evidence recognized and admitted in courts of justice which juries may accept as proof of a crime. The first type of evidence is direct evidence, that is, testimony of an eye witness. The other type of evidence is circumstantial evidence, that is, a chain of circumstances pointing sufficiently strongly to the commission of a crime by the defendant. Circumstantial evidence [fol. 506] may consist of any act, declaration or circumstance admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than direct evidence. If upon consideration of the whole case, you are satisfied beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence, direct or circumstantial. In the case of circumstantial, each fact essential to complete the chain. . . ."

Yes, I read that before. Now would you be requesting that?

Mr. Gladstein: No, that's not the one that we had in mind. We are talking about a portion that would relate to Instruction 4.06 dealing with proof of intent. Now you are going to give 4.06, as I understand it, and it seems to

me that this proposed 14 properly belongs there as an addition to 4.06.

Mr. Poole: I don't think that intent or the proof of intent is any different from the proof of any other kind of fact; that if Your Honor believes that there is a place for an instruction on circumstantial evidence, then the circum-[fol. 507]stantial evidence instruction would be equally applicable to any other fact.

The Court: Here is the one I would say covers it:

"Where the Government relies upon circumstantial evidence for conviction (this is the one you are referring to, Mr. Poole), the rule of law is that the circumstance proven must point not only to the defendant's guilt but must be inconsistent with his innocence. As otherwise stated, the circumstances proven must be such as to admit of no other reasonable hypothesis or explanation than the guilt of the accused."

Mr. Poole: Yes, and the question next is whether the Government is relying upon circumstantial evidence in this case, and I don't believe the Government is. We believe we have shown membership on the Executive Board of ILWU Local 10 directly by testimonial evidence and by the official records. We believe we have shown membership. Membership in the Communist Party is. . . . I think I am wrong; there is circumstantial evidence on that.

The Court: Yes, that's all it is.

Mr. Poole: I am wrong on that, yes. So there is a place for circumstantial evidence in the case and the instruction should be given, yes.

(Further discussion.)

Mr. Gladstein: Then, Your Honor, you are going to give [fol. 508] the instruction you have just read on circumstantial evidence?

The Court: Yes. It is contained in the one I first read. They are part of the same one.

Mr. Gladstein: Oh, are they? I didn't know that.

(Further discussion.)

Mr. Gladstein: Your Honor is going to deny No. 14, then?

The Court: That is the one on proof of intent alone. All right, 14 will be refused.

15: "If you find that the defendant had reason to believe and did believe that the activities in which he participated were lawful or protected by the Constitution of the United States, then even if such belief was mistaken. . . ."

Now I don't think I would give that.

Mr. Gladstein: In the alternative, Your Honor, we ask that the following instruction be given:

"If you find that the defendant had reason to believe and did believe that the activities in which he participated were lawful or protected by the Constitution of the United States, then even if such belief was mistaken, it would be your duty to consider such evidence in determining his guilt or innocence."

Mr. Poole: That seems to be covered by the Braden case [fol. 509] that we have referred to: . . . Braden vs. United States, 365 U.S.431, and Sinclair vs. United States, 279 U.S.263.

The Court: Well, I will refuse that one. Isn't that covered by circumstantial evidence that I just read, 16?

Mr. Poole: Yes.

The Court: Yes, by this one. This is the one I just read. So it is refused as covered.

17.

Mr. Vincent: That's covered already, isn't it?

The Court: I think it is covered by the instruction we agreed on earlier out of the forms here, so that will be refused as covered.

18. Well, I think I have covered all of this except the duty of lawyers. I will be happy to say something about that.

(Short discussion.)

The Court: I think it is covered.

Mr. Vincent: That is stricken out?

The Court: Yes, that's all in there.

Mr. Gladstein: Judge, on that one, No. 19, the second sentence, we would like to delete the words beginning on line 5, "to this Court, to your country and to your honor," not because we—

The Court: —think any the less of it.

Mr. Gladstein: That's right. I don't care about pre-[fol. 510] conceived belief," because it's just "beliefs" or "belief." We ought to take the word "preconceived" out of line 12.

Mr. Leonard: The same thing out of line 15, then.

Mr. Vincent: Before we get there, gentlemen, how about lines 8 and 9? "This obligation will not be fully discharged merely by confining your deliberations to facts which are in evidence."

Mr. Leonard: The word "not" is obviously in error.

The Court: Yes. "Will be."

Mr. Gladstein: And you can't say "merely."

The Court: Yes, taking words out of my mouth. "This obligation will be fully discharged only by confining your deliberations. . . ."

Mr. Gladstein: Yes. ". . . . to facts which are in evidence." Inferences, too.

The Court: Otherwise. All right, then, I would otherwise give it.

(Further discussion.)

Mr. Leonard: The next several instructions all deal with the same subject matter. What it is important to do is to tell the jury that they aren't to use any different standards in this case because the man is a communist.

(Brief discussion.)

Mr. Poole: On No. 1 you give the instruction, "Under our system you may not find the defendant guilty merely by [fol. 511] reason of the fact, if you find it to be a fact. . . ."

Mr. Gladstein: This is very different, Cecil.

Judge, I think that No. 19, we will withdraw that.

The Court: All right.

Mr. Gladstein: We will withdraw No. 19, but with No. 20 and 21 and 22, and the general subject matter that 19 was intended to reach, what we have in mind is this—and I am not wedded to our language there or the language we borrowed: we think the jury should be told in effect that quite understandably, the members of the jury are opposed to communism and have strong feelings about that subject and about the Communist Party, but that those matters have

nothing to do with this case, along those lines—the teachings and the doctrines of the Communist Party, what they are.

The Court: I think on 21 there ought to be a sentence: “But on the other hand, if you believe that the defendant is guilty and so believe beyond a reasonable doubt, then it is your duty to find him guilty.”

Mr. Gladstein: Which one is that, Judge?

The Court: I mean on 20, the last sentence: “In this case as in others, the interests of the United States require the acquittal of the innocent and even of persons who may be guilty but whose guilt has not been proved beyond a reasonable doubt. However, on the other hand, if you find.

Mr. Gladstein: That’s all right. Well, then, you will give [fol. 512] with the addition?

The Court: I see no reason not. Any objection to it, the wording?

Mr. Poole: Well, I think you have already told them about their duty in face of a showing of reasonable doubt, Your Honor.

The Court: Well, yes, but you know, this one sort of reminds me of what you might do in a civil case—just because this defendant is a corporation and you think it’s got a lot of money, you can’t treat it any differently than you treat the plaintiff as an individual.

Mr. Poole: I am not objecting to the general sense of what Mr. Gladstein said in paraphrasing it, but you are telling the jury that because this man is charged with communism, they can’t apply a different standard. But as to the rest. . . . I was assuming that you would adopt some defense language to say the substance of what he had here.

The Court: All right, that’s what we are trying to get.

Mr. Poole: But it seems to me to be a good defense argument—but not quite necessary to instruct the jury on.

Mr. Vincent: Let’s strike out of line 6. . . .

Mr. Gladstein: I will tell you what I think. Mr. Vincent has got the right suggestion. Judge, if you strike out the last sentence, beginning with one word on line 9—

[fol. 513] Mr. Leonard: Just leave the whole thing out from then on.

Mr. Gladstein: Yes, from then on.

The Court: A period after "impartiality." All right, the balance is. All right, let's get this out.

Mr. Gladstein: Let me try to read it from my notes and see if we are in agreement:

"I charge you that no considerations of policy or loyalty or patriotism can justify you in applying to this case any standard of proof less strict than you would apply to the trial of a person in any other type of a case. You are not summoned here to take part in any struggle against communism but to discharge a function requiring the highest standards of impartiality."

The Court: Do you want to tie this in with the defendant as an individual, not as a general struggle?

Mr. Gladstein: Let me suggest that we do it this way, combining No. 20 as amended, and 21:

"I charge you that no considerations of policy or loyalty or patriotism can justify you in applying to this case any standard of proof less strict than you would apply to the trial of a person in any other type [fol. 514] of case. You have not been called here to take part in any struggle against communism but to discharge a function requiring the highest standards of impartiality."

"The doctrines or policies or teachings of the Communist Party are not involved in this case in any shape, manner or form. You are not to consider any such matters in arriving at your verdict. We are here concerned only with the acts and conduct of the defendant in his capacity as an Executive Board member of Local 10 and his guilt or innocence is to be determined solely upon the evidence relating to such acts or conduct and under the instructions that I give you."

The Court: "We are here concerned only with the acts and conduct of the defendant in his capacity as Executive Board member of Local 10."

"His acts and conduct"—you had in mind in drafting this the acts and conduct necessary to show some—your argument has been some overt act from the mere membership is not sufficient.

Mr. Leonard: The Judge is saying as to our specific intent argument—

The Court: Right.

Mr. Leonard: Leave out the words "acts and conduct." [fol. 515] Mr. Poole: How about "We are here concerned only with the defendant and not with the doctrine"—

Mr. Gladstein: "We are here concerned only with the defendant in his capacity as an Executive Board member of Local 10." I don't know about the balance.

The Court: You are getting back to "acts and conduct."

Mr. Gladstein: "His guilt or innocence is to be determined—"

The Court: "... on the evidence and under the instructions which I have given you."

Mr. Gladstein: That's it.

The Court: Do you want me to read it to you so we can see what we have here?

"The doctrines or policies or teachings of the Communist Party"—this is 21—"are not involved in this case in any shape, manner or form. You are not to consider any such matters in arriving at your verdict. We are here concerned only with the defendant. His guilt or innocence is to be determined solely upon the evidence and the instructions."

Mr. Poole: Are we combining 20 with 21 in doing this?

The Court: I would think so.

Now we will go back to this "struggle" again.

Mr. Poole: That is going out?

[fol. 516] Mr. Gladstein: No, why should it?

Mr. Poole: May I suggest an amendment to that No. 20, the second sentence? Instead of "you are not summoned"——

Mr. Gladstein: "Called."

Mr. Poole: "You are not here to consider communism as such but to discharge a function requiring the highest standards of impartiality." Then you go to the next one and tell them about the doctrine of the Communist Party not involved.

Mr. Gladstein: I don't have any objection to changing that pronoun from "you" to "we." I think maybe it would make the jury more comfortable to think that they have not been singled out about that. In fact, the entire proceeding—I think that that is what they have to be told—that the judicial process is different from what goes outside the courtroom.

Mr. Poole: I'm not going to make a point of that pronoun.

The Court: "We are not here to take part in any struggle against communism, but to discharge a function requiring the highest standards of impartiality."

Mr. Gladstein: We do request No. 22 as it stands but [fol. 517] I am not going to argue it because it has an element in it of specific intent and Your Honor has already ruled.

The Court: Right.

Mr. Gladstein: So I assume it is to be denied.

Now we ask for an instruction to the jury in the language of Section 4 (f) of the McCarran Act, so-called, the general sense of which is that neither membership nor holding office in the Communist Party is a violation of any federal criminal law in and of itself per se, or whatever the language is that is in the statute. I think it does say "per se" or "in and of itself." If Your Honor wants to use something instead of a Latin phrase, I have no objection.

Mr. Vincent: I think, Your Honor, possibly if we go

back to your essential elements you might tie this in at the end of your essential elements and say:

"I do, however, instruct you that membership in and of itself or the holding of an office in the Communist Party is not, in and of itself, a crime,"

and then you have got to find all the essential elements beyond a reasonable doubt, to tie them in. In other words, you have got your 4 (f) instruction.

The Court: I will give the first sentence, the 4 (f) of the McCarran Act and I will also tell them that membership on the executive board of a labor organization is not a crime in and of itself.

[fol. 518] Mr. Leonard: For the record, we requested some additional instructions the other day with respect to advice of counsel. The record, I take it, will show that Your Honor's earlier rulings on that matter disposes of those requests.

The Court: I think so. If they were all on advice of counsel, then they were.

Mr. Leonard: Good faith reliance. I will mark these Nos. 23, 24, 25, 26 and 27.

(Refused.)

[fols. 519-526] MORNING SESSION, THURSDAY, APRIL 5, 1962

(The following proceedings were had in chambers outside the presence of the jury.)

Defendant's renewal of motion for judgment of acquittal and denial thereof.

Mr. Leonard: If Your Honor please, at this time the defendant renews the motion for judgment of acquittal which was made at the conclusion of the Government's case. Now that all the evidence is in and the matter is submitted, before the matter is submitted to the jury, we deem it appropriate to renew that motion under the provisions of

Rule 29(b) and we do renew the motion at this time. Rather than take any time to argue it extensively, we would be glad to submit it on the arguments heretofore made on the record.

The Court: I presume you also submit it?

Mr. Poole: We would submit it on the arguments, yes. I believe the rulings have been quite correct.

The Court: All right, it will be denied at this time. That is all you wanted?

Mr. Leonard: Yes.

The Court: All right.

[fol. 527] CLOSING ARGUMENT FOR DEFENDANT

Mr. Gladstein: May it please Your Honor and ladies and gentlemen of the jury, I am going to ask you to return a [fols. 528-533] verdict of not guilty in this case on account of the failure of the prosecution to elicit here that degree of proof which the law requires before a man can be convicted.

[fol. 534] This case, I said, is not about Communism. It is not. What is it about? It is about Archie Brown. Archie Brown, an individual, a human being, a longshoreman, a working man, a member of the Longshoremen's Union, a member of the Executive Board of that union, a member of the Publicity Committee of that union, elected over and over again by them. He is what this case is about. Yes, and I will say, a man who, outside of the union, as the evidence indicates, has political affiliations of which most people disapprove; and a man who publicly is reputed on the waterfront to be a member of the Communist Party. In that union there is no evidence in this record as to any Communist Party activity on the part of the defendant or anybody else. So this case is about him and what he said and what he did.

I wonder if you noticed Mr. Vincent said, in effect, the Government isn't concerned with what he did or what he said. They tried to produce this for a narrow reason, simply [fol. 535] to show that he was there. Good Heavens!

If the jury is not to be interested in what the man said and what he did in the union, if the jury is only to be interested in what they say he said someplace in New York or elsewhere, well, of course that's the way they would like to have you look at it. They would like to put you in that strait jacket, if they can, and say, "Don't look at all the evidence. Don't look at all this record." And they say, "We only read this for the purpose, not of proving what was done or said, but for the purpose of showing he was there."

Well, he wasn't there in the sense of an astral body. He was a human being—flesh, bones, brain, voice. How can he have the temerity to suggest to you to disregard what Archie Brown said at those meetings, what Archie Brown did at those meetings, whether they constituted a service and what kind of a service? Why, we are dealing with whether his service on that board was unlawful and wilful and knowing.

Mr. Poole: Your Honor, I am going to object to this. Mr. Gladstein is not correctly stating the law. There is no issue in this case of whether his service on the Executive Board—

Mr. Gladstein: Please don't interrupt.

Mr. Poole: —was lawful or unlawful. The issues here were whether he served as a member of the Board while a member of the Communist Party. Now, we have gone [fol. 536] through this many times.

The Court: Wilful service.

Mr. Gladstein: I said that. I said that.

Mr. Poole: You don't have to show that he did unlawful acts on that Executive Board other than being—

Mr. Gladstein: Excuse me. If Your Honor please, I resist this intrusion. I think the record—

Mr. Poole: I want that on the record.

The Court: Proceed.

Mr. Gladstein: I think the record will show that I said we are concerned with the service unlawfully, wilfully, and I said "knowingly," and that's in the indictment as charged. And the Judge will instruct you; I am not undertaking to do it. But didn't they admit to you that they can't put a hyphenated American in jail as such? Didn't they admit it, in effect? I will read what Mr. Poole had to say. You know, after they admit it, they want you to forget it. You know

what they are saying here now? They are saying it's all right to be called Mr. Jones; that's okay. They are saying it's all right to be called Mr. Smith, but you can't hyphenate those and get yourself called Mr. Jones-Smith, with a hyphen in between. That's what they are saying. They are saying it's all right to be a Communist on the one hand, it's all right to be a union man on the other, but if you have the combination of the two, that's against the law. But that's not what Mr. Poole admits, and has to admit.

[fol. 537] Mr. Poole: Just a moment, now. Your Honor.

Mr. Gladstein: Please don't interrupt, counsel.

Mr. Poole: Well, I am going to interrupt—

Mr. Gladstein: I want to read from the transcript—

Mr. Poole: —every time he does this. I hate to do it.

Mr. Gladstein: Then please don't.

Mr. Poole: He is now challenging the law itself, and this he can't do.

The Court: That's correct.

Mr. Gladstein: No, Your Honor, I want to read from the transcript.

The Court: But you are to argue, Mr. Gladstein, now, the facts of this case.

Mr. Gladstein: That's what I am going to argue.

The Court: And draw reasonable inferences from the facts.

Mr. Gladstein: Yes.

The Court: Now, I take it your discussion here has been a discussion of law in the last analysis.

Mr. Gladstein: Well, I will depart from it.

The Court: Just the law, and that is improper.

Mr. Gladstein: I do not intend to discuss the law as such.

[fol. 538] The Court: The Court will instruct as to the law. Proceed with the facts and draw reasonable inferences from the facts.

Mr. Gladstein: Well, I would like to read from the transcript. This I may do, Your Honor, as to what Mr. Poole said?

The Court: If it is factual.

Mr. Gladstein: Well, it was in the presence of the jury and Mr. Vincent—

The Court: Well, but that still doesn't give any right to argue what the law is.

Mr. Gladstein: I am not going to argue it. I just want to read what he said.

The Court: As a matter of law?

Mr. Gladstein: No, he said it in the presence of the jury.

[fol. 539] Mr. Gladstein.

How does one find intent? How is it proved? It is proved, as His Honor will tell you, from conduct and from statements. Circumstantial evidence, direct evidence. Well, here is the evidence and we know what the chain of events is that brought this case into being. It all started, as we know, with a telegram which is in evidence here, which was read to you by the prosecution, which was sent to the union. That's quoted on pages 47 to 49 of the transcript, and Mr. Poole read it to you. There is set forth the passage of the law and a request for a written list of people who are described and defined in that letter to be sent to The Secretary of Labor. That was addressed to the president of the International Union to which Mr. Brown belongs. And that is the first thing, the earliest in date, that is the first thing that we have, and it was introduced by the prosecution. And you are entitled to read every single word of that telegram, because it is in evidence and it is a part of the evidence that you are to consider.

And then there was a reply to it, and that reply, as you may remember, was the result of the matter being submitted by Mr. Bridges to the attorneys. You remember from the language it was not a captious thing; it was something that was submitted to the men who have represented that union for a quarter of a century and more, and who [fol. 540] put their minds to the problems and spoke on behalf of the International Union. And, members of the jury, that which is in evidence and which appears at pages 49 to 52 of this record in pertinent part contains the language as follows:

"In our judgment, and we have so advised Mr. Bridges, Section 504 is unconstitutional——"

Mr. Peole: I am going to object to this, Your Honor.

Mr. Gladstein: Your Honor, I am not arguing law; I am quoting.

Mr. Peole: Your Honor, let it be said, no one likes to be interrupted in making his argument, but counsel is persisting in attempting to argue to this jury the constitutionality of this statute or its legal construction, and I submit to Your Honor that this is improper; it is not a part of argument and it is to be reserved to the Court.

Mr. Gladstein: Your Honor, may I say I am not arguing anything about the validity of the law. I am reading the evidence and seeking to comment upon it. It is part of the evidence that was received at the request of the prosecution that goes to whether or not this defendant is to be found guilty or not guilty on Your Honor's instructions that there must be a union of act and intent. I am not seeking to argue the law's validity or invalidity. I haven't said one word about that. What did we spend all this time here for if I can't read from the transcript?

[fol. 541] The Court: Well, it's not a question of reading from the transcript; it is a question here as to whether or not you are arguing to this jury that because there happens to be a letter from a group of lawyers representing the union, I mean your office representing the union, stating their opinion as to the validity of the law and an interpretation of the law, because that happens to be a part of the records that are before us, I don't think that gives you the right to argue that the statements therein and the law as stated by the letter from your office concerning these matters, is to be taken by this jury as even evidence or opinion as to the validity of the law, either as to its constitutionality or any interpretation.

Mr. Gladstein: May I say, Your Honor, that is not what I am saying. I will say now, freely and voluntarily, any opinion that I have concerning the law is of no consequence. Your Honor's opinion and statement to the jury and instruction is what is of consequence.

The Court: All right.

Mr. Gladstein: There is no question about that. I can be as wrong as anyone.

The Court: Proceed.

Mr. Gladstein: But I was reading simply from the letter

because it is in evidence. I am not asking the jury to take that as representing something they should believe the law to be or not to be, but it is a part of what took place.

[fols. 542-556] The Court: Well, I know that. It's part of a group of minutes that were offered in evidence, an attachment thereto. I don't think that, in and of itself, makes it evidence of anything that is to be taken by the jury as evidence of a fact here, and we are only interested in the facts here.

Mr. Gladstein: We are interested in the facts and the circumstances from which the jury will infer and decide, Your Honor, under Your Honor's instructions, whether this law was violated with that "knowingly," or whatever Your Honor will say to the jury. It must be done on the face of the record from the evidence. Now, I think I have made it clear—

The Court: All right, proceed with your argument. I will listen to it.

Mr. Gladstein: It makes it difficult. I am trying, Your Honor, to stay completely within bounds, but if I may not comment on the evidence—I know Your Honor hasn't said that—

The Court: That's right.

Mr. Gladstein: But bear with me. It is difficult, perhaps, to separate those two problems.

[fol. 557] Mr. Gladstein: In the recess I was reflecting on the statement that Mr. Vincent made. "We introduced this evidence," he said, "for a very narrow purpose." Yes; indeed! For the purpose of securing a conviction. And all their objections up to today, and their objections today, and what they have to say to you, is because they want to keep it that narrow, to try to prevent that consideration of the evidence under the instructions as to the law given by the Court that will lead to an acquittal. Sure they want it narrow. They will say, as Mr. Vincent said to you this morning, "The defendant was well-aware of this law, he was well-aware of what this law was about." Yes, he was well-aware of what he heard his union president say—Mr. Bridges, 44 years as a trade unionist, a member of this

longshore local in San Francisco for 30 years, and for a quarter of a century the president of this international union. If there is a trade unionist in this country, I don't think anyone can be any more qualified than he. What was it that he said that made Mr. Brown aware of what this was [fol. 558] all about, as appears on page 418? And that's where they thought he was going to make a speech, but that's where he told you in a few words everything.

"Mr. Bridges, this directs your attention to the special Executive Board meeting of October 29, 1959, which began, the minutes say, at 8:25 p.m. and terminated at 11:00 o'clock at night. I ask you now, and confine your answer, please, to only that portion of this law which is designated Section 504—that's the one we are concerned with here. You remember there were other portions of the law that were discussed, but we are not concerned with those, the content of them, here. What I ask you now, what it was that you said on that occasion of that meeting, with Mr. Brown sitting there and hearing it.

"A. That meeting was one of many meetings we had, and what I said specifically was that due to this law, we could no longer operate the union as a democratic institution, operate it honestly, let the membership elect whom they choose as officers. We could no longer follow and support trade union principles, vital trade union principles, which we knew from experience were vital to our existence. And that our union would be the first union attacked under this law for political purposes."

[fol. 559] And I asked him another question:

"What did you say in regard to doing business in the same old way?" And he said:

"What I meant was just what I said, that no longer can we operate the union as a democratic organization, as an honest organization. No longer could we be a trade union. That's what I said. No longer can we be a trade union."

Now let's examine those. He was saying to Mr. Brown, "We have always, in this organization—we have a democratic institution in our union. We must keep it that way." I don't suppose anybody would want to see that destroyed or go back to the time 30 years ago when our waterfront was very different. He said, "We are faced with a challenge as to whether we can operate honestly." Honestly. You know how they operate: honestly. He said, "What we are up against is a challenge as to whether the membership can elect whom they choose as officers." You and I would try to adjust, I know. We would seek every possible lawful way to adjust, if suddenly somebody were to say that you and I couldn't have any voice in the election of candidates for political office. If it were no longer possible to nominate anybody and vote for anybody that you and I choose, we would try to adjust.

Mr. Poole: Your Honor, I am going to object at this point. Now Mr. Gladstein has come right up to it again, [fols. 560-564] talking about using—

Mr. Gladstein: I resent this intrusion. I am commenting on the evidence.

Mr. Poole: I hope you do because I resent the way Mr. Gladstein has been doing this—I believe, Your Honor, in complete defiance of Your Honor's instructions and the laws as we have argued them before.

Mr. Gladstein: If Your Honor please—

Mr. Poole: He is now telling this jury—

Mr. Gladstein: Just a moment, now. I resent Mr. Poole telling me what I am telling the jury. The jury knows what I am saying.

Mr. Poole: Your Honor has ruled—

The Court: Gentlemen, let me say this to you: Now, Mr. Gladstein, without any further discussions on law—

Mr. Gladstein: I am not talking about the law, I am commenting on the evidence, Your Honor. What have I said about this law? I am asking the jury—

* * * * *

[fol. 565] And I am sure he also has a reputation—I am sure Mr. Poole is busy scribbling this—he bears a reputation as a communist. But you know, pause to consider. [fol. 566] In all the testimony that you heard from Mrs.

Thompson and from others as to what took place in the Communist Party and so forth and so on, did you hear one word that Archie Brown did something, which, in and of itself—

Mr. Poole: Your Honor, I am going to object to this.

Mr. Gladstein: I may comment on the absence of evidence.

Mr. Poole: Mr. Gladstein is importing into this the lack of evidence.

Mr. Gladstein: Your Honor, this is about the tenth time. Now I assign this as misconduct, Your Honor.

The Court: Just a moment. Just let me hear the objection. What was it?

Mr. Poole: I object to the argument that the evidence from the witness Thompson relating to Mr. Brown's participation in the Communist Party did not also bring in evidence of independent unlawfulness. Your Honor knows that this has been discussed by us many times.

Mr. Gladstein: I am not talking about independent—

The Court: All right, independent unlawfulness is not a part of this case, nor is any such thing involved.

Mr. Gladstein: I am simply pointing out, Your Honor, that in all of this record, in all of this record where Mr. Brown is quoted as saying this, that or the other—all I am [fols. 567-571] asking is the right to direct the jury's attention to the fact that he never said or did anything which was evil or bad or charged to be unlawful.

The Court: Go ahead.

Mr. Gladstein: That's all I am saying.

The Court: Go ahead.

Mr. Gladstein: And unknown to them, of course, there was Mrs. Thompson, who was present as an agent of the federal bureau. I guess you listened carefully to what she had to say. And when you add it all up, not one word was said or attributed, not one act was claimed to be attributable, to Mr. Brown, which in any way would question that evidence that we have produced of his reputation for being a law-abiding citizen.

The Court: Now we are back again. Now let's get along and drop this. Get along. The lack of evidence to Mrs. Thompson. . . .

Mr. Gladstein: All right. I do wish to say about Mrs.

Thompson that I guess we can all rest easy in our beds now, inasmuch as she has told us what takes place on those outside occasions. But I want you to know, as far as I am concerned, this case has nothing to do with any Communist Party activities in the union. There isn't any evidence of that.

[fol. 572] In every criminal case the evidence can be looked at one way and it squares with guilt. The other question is, is there a way of looking at it that squares with innocence? And if you find, His Honor will so tell you, that there may be a hypothesis, there is a line of reasoning and thinking, there is a way of feeling, that this man's acts were innocent acts for innocent reasons, done in the context which [fol. 573] you have seen, open and aboveboard, unconcealed, not secret, attached to an organization, done with an organization, done for or in connection with an organization, that is responsible for him being able to put bread in the mouths of his children—if you understand it in that light—that it was done for an innocent reason, there is that line of thinking, and in itself, alone, that is enough.

Mr. Poole: Just a moment, Your Honor. That is not the law.

Mr. Gladstein: I am about to conclude, Mr. Poole, if you please.

Mr. Poole: We disposed of that question, I thought.

The Court: I thought we did.

Mr. Gladstein: Isn't Your Honor going to give that instruction? Didn't I understand Your Honor—

The Court: I am not talking about a specific instruction but—

Mr. Gladstein: That is all I was talking about.

The Court: —the question of what the law is here. I think you can go ahead and finish up.

Mr. Gladstein: I am finished. In fact, I was about to thank you, and I will thank you, and I do. And I will ask you again what I asked you at the outset, for a verdict of not guilty as charged in this case. Thank you.

[fol. 574] (The following proceedings were had outside the presence of the jury.)

Mr. Gladstein: Your Honor, I want to lay upon the record my vigorous objection, which obviously I could not make during my summation to the jury, because it would simply mean a breaking up of the thinking of the jurors and destroy their continuity of thought as well as upset any equilibrium that an advocate may have in making a presentation, for the numerous interruptions by the United States Attorney, without any justification whatsoever in the majority, if not all of them. I want to say this, Your Honor: In no place will an examination of the record show that I purported at any time to tell that jury what the law is or not. Nor to say anything about the law being valid.

The Court: The argument is taken down, it's in the [fol. 575] record.

Mr. Gladstein: I want to say—

The Court: Your objection now is also noted.

Mr. Gladstein: Can't I make the assignments? It won't be noted if I don't make them, Your Honor, including the last one. When I was speaking about an instruction that I understood Your Honor would give about the two hypotheses. Maybe I am wrong.

The Court: Oh, no, we had it.

Mr. Gladstein: What?

The Court: We have settled the instructions. You were not wrong.

Mr. Gladstein: Well, I was not wrong. Then that certainly should not have invited any kind of interruption.

The Court: I don't believe that Mr. Poole assigned any question about an instruction that would or would not be given.

Mr. Poole: All I was arguing about—

The Court: I did state. . . . Go ahead.

Mr. Poole: Your Honor, I was arguing about—I was objecting to Mr. Gladstein's repeated statement to this jury that it is the law that the existence of what he called an innocent motive—

Mr. Gladstein: I didn't say "motive."

Mr. Poole: —would be sufficient to acquit.

[fol. 576] Mr. Gladstein: I didn't say "motive." I didn't say that at all.

The Court: Well, the words—whatever they were—that was it.

Mr. Gladstein: I can well—

Mr. Poole: "Innocent reason" were the words.

The Court: All right, we don't have your assignment of record. Complete your assignment and then we don't have to argue it now. It is something in the record.

Mr. Gladstein: I assign each and every interruption of Mr. Poole as constituting prejudicial error in this case.

The Court: All right.

Mr. Gladstein: And justifying a reconsideration of the entire matter, and as being a deliberate effort to impair the effectiveness of my presentation to the jury.

Mr. Leonard: Your Honor, may I supplement that?

The Court: No, I think we have it in.

MOTION FOR MISTRIAL AND DENIAL THEREOF

Mr. Leonard: I don't want to add an argument, I want to make a separate and additional motion, because Mr. Gladstein is making the argument and he was obviously involved. I want to move for a mistrial, not only upon the ground of Mr. Poole's interruptions, but on the grounds, respectfully, of the Court's comments in the presence of the jury with respect to those interruptions. I submit that they preclude the defendant from having had a fair trial, and I move for a mistrial.

[fol. 577-592] The Court: All right, it will be denied. I find nothing in the record of Mr. Poole's comments nor his interruptions that sustain the statement of either Mr. Gladstein or Mr. Leonard. Motion is denied.

[fol. 593] INSTRUCTIONS TO THE JURY

The Court: Members of the jury, the presentation of the evidence in the case is now concluded. You have listened to the arguments of respective counsel. Let me say to you first of all that it is your exclusive province to judge the facts of the case. It is the exclusive function of the Court to instruct you as to the applicable law, which in turn you will apply to those facts.

I express no opinion as to the facts or evidence, nor do I wish you to understand or conclude from anything that I may have said during this trial or in the course of these instructions that I have intended, directly or indirectly, to indicate any opinion on my part as to the facts or as to what I think your finding should be. Members of the jury, you and you alone are to decide these facts.

In your deliberations you must wholly exclude any sympathy or prejudice from your minds. Don't concern yourself with matters of punishment of the defendant in the event of a verdict of guilty. The matter of punishment is for the Court and the Court alone. Your province is to determine the guilt or innocence of the defendant.

As I advised you at the time of your empanelment, you must keep in mind that no presumption whatever arises because the Grand Jury has indicted the defendant, that the defendant is guilty. At all stages of this proceeding the defendant is presumed to be innocent. This presumption [fol. 594] remains with him throughout the trial and is of itself a form of evidence which is sufficient to support a verdict of not guilty. It continues until the evidence introduced for or on behalf of the Government proves to your satisfaction his guilt beyond a reasonable doubt.

A reasonable doubt is just exactly what that term implies. It means a doubt based upon reason. It does not mean every conceivable kind of doubt, it does not mean a doubt that may be imaginary or fanciful, or one that is captious or perhaps speculative. It means simple an honest doubt that appeals to reason and is founded upon reason.

A reasonable doubt may arise not only from the evidence produced but also from the lack of evidence. Since the burden is upon the prosecution to prove the accused guilty beyond a reasonable doubt of every essential element of the crime charged, a defendant has the right to rely upon failure of the prosecution to establish such proof. A defendant may also rely upon evidence brought out on cross-examination of witnesses for the prosecution. The law does not impose upon a defendant the duty of producing any evidence.

A reasonable doubt exists in any case when, after careful and impartial consideration of all the evidence, the jurors

do not feel convinced to a moral certainty that a defendant is guilty of the charge. If after considering all of the evidence in this case you have such a doubt in your mind as [fol. 595] would cause you to pause or hesitate in some important or vital transaction of your own life before acting, then you have the kind of a doubt that we describe as a reasonable doubt in legal terms.

There is almost always difficulty in proving a fact to an absolute or to a complete certainty. Therefore, you should keep in mind that a reasonable doubt is not a merely possible or imaginary doubt or bare conjecture. The rule of reasonable doubt applies to every material element of the offense charged.

Whether or not you believe the witnesses who have testified in this case and the weight to be attached to their testimony respectively is a matter for your sole and your exclusive judgment. A witness is presumed to speak the truth, but this presumption may be negated by the manner in which he testifies, by the character of his testimony, by contradictory evidence or by his motives.

In passing upon the credibility of the various witnesses, it is your right to accept the whole or any part of their testimony, or to discard and reject the whole or any part thereof. If it is shown that a witness has willfully testified falsely on any material matter, you should distrust his testimony in other particulars, and in that event, you are free to reject all of a witness's testimony, unless from all of the evidence, you shall believe that the probability of [fol. 596] truth favors his testimony in other particulars.

You must disregard entirely any testimony stricken out by the Court or any testimony to which an objection is sustained.

The attorneys in their arguments have commented upon and they have argued on the facts. If you find any variance between the facts as testified to by the witnesses and what has been stated to you by counsel to be the facts, to the extent of such variance you must consider only the facts as testified to by the witnesses. Statements and arguments of counsel are not evidence in the case unless made as an admission or as a stipulation of fact.

All evidence relating to any oral admission or oral con-

fessions or other incriminating statements claimed to have been made by a defendant outside of the court should be considered with caution and weighed with great care.

The law does not compel a defendant to take the witness stand and testify, and no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify.

You may find discrepancies or inconsistencies in the testimony of a witness or perhaps between the testimony of different witnesses. If such discrepancies or inconsistencies are not material and do not affect the true issues of the case, and if they do not reasonably bear upon the guilt or [fol. 597] innocence of the defendant, do not waste time considering them. Use your good sense, members of the jury, just as you would in acting upon the most vital and important matters pertaining to your own affairs. Resolve the facts of this case according to a calm, deliberate and cautious judgment, in the light of your own knowledge of the natural tendencies and propensities of human beings. Remember that the defendant is entitled to any reasonable doubt that you may have in your minds, but at the same time remember that if you have no such doubt, the Government is entitled to your verdict.

Where a defendant has offered evidence of good general reputation as a law-abiding citizen, the jury should consider such evidence along with all the other evidence in the case. Such evidence of a defendant's reputation may give rise to a reasonable doubt, since the jury may find it improbable that such a person would commit a crime.

Under our system of law, guilt is purely personal. You may not find the defendant guilty merely by reason of the fact, if you find it to be a fact, that he is a member of the Communist Party. As a matter of fact, neither membership in nor the holding of office in the Communist Party is a crime in and of itself. Nor is membership on the executive board of a labor organization a crime in and of itself.

I charge you that no consideration of policy, of loyalty or patriotism, can justify you in applying to this case any [fol. 598.] standard of proof less strict than you would apply to the trial of a person in any other type of case. We are not in court here at this time to take part in any struggle against communism, but to discharge a function

requiring the highest standards of impartiality. The doctrines or policy or the teachings of the Communist Party are not involved in this case in any shape, manner or form. You are not to consider any such matter in arriving at your verdict. We are here concerned only with the defendant; his guilt or innocence is to be determined solely upon the evidence and upon the instructions of the Court.

The defendant is charged with a violation of the provisions of Section 504 of Title 29 United States Code, commonly known as the Landrum-Griffin Act. The pertinent portion of the statute provides that: "No person who is a member of the Communist Party shall serve as a member of any executive board or similar governing body of any labor organization during his membership in the Communist Party."

The indictment herein reads as follows:

"The Grand Jury charges from in or about October, 1959, and up to and including the date of this indictment, in the Northern District of California, Artie Brown, also known as Archie Brown, did unlawfully, knowingly and willfully serve as a member of an executive board of a labor organization, namely, member of [fol. 599] the Executive Board of Local 10 of the International Longshoremen and Warehousemen's Union, while a member of the Communist Party, in willful violation of Title 29 United States Code, Section 504."

The Government must prove beyond a reasonable doubt that at some time during the period between October 1959 and May the 24th, 1961, the defendant willfully served as a member of the Executive Board of a labor organization, in this case, the ILWU, Local 10, and that at the same time he was a member of the Communist Party.

In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

Intent and motive should never be confused. Motive is that which prompts a person to act. Intent refers only to the state of mind with which the act is done or omitted. Personal advancement, financial gain, are two well-recog-

nized motives for much of human conduct. These laudable motives may prompt one person to do voluntary acts of good and another to voluntary acts of crime. Good motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid in determination of his intent.

Intent may be proved by circumstantial evidence. It [fol. 600] rarely can be established by any other means. While witnesses may see and hear, and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eyewitness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

It is reasonable to infer that a person ordinarily intends the natural and the probable consequences of acts knowingly done or knowingly omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the accused intended all the consequences which one standing in a like circumstance and possessing like knowledge should reasonably have expected to result from any act knowingly done or knowingly omitted by the accused.

There are two types of evidence recognized and admitted in courts of justice which juries may accept as proof of crime. The first type of evidence is direct evidence, that is, the testimony of an eye-witness to the commission of a crime or the admission of guilt by the defendant. The other type of evidence is circumstantial evidence, and that is a chain of circumstances pointing sufficiently strong to the commission of a crime by the defendant. Circumstantial evidence may consist of acts, declarations or circumstances admitted in evidence, tending to connect the defendant [fol. 601] with the commission of a crime. There is nothing in the nature of circumstantial evidence that renders it less reliable than direct evidence. If upon consideration of the whole case you are satisfied beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the degree of proof required for conviction, but

only requires that the jury shall be satisfied beyond a reasonable doubt by evidence, direct or circumstantial, or both.

In the case of circumstantial evidence, each fact essential to complete a chain of circumstances must be shown which is not only consistent with the guilt of the defendant but inconsistent with any other reasonable hypothesis. This must be shown to your satisfaction beyond a reasonable doubt, as I have defined reasonable doubt to you.

You will note that the acts charged in the indictment are alleged to have been done knowingly. The purpose of adding the word "knowingly" was to insure that no one would be convicted for an act done because of mistake or inadvertence or other innocent reason. "Knowingly" means knowledge. And as willfulness is an element of the offense charged, it is necessary for the Government to prove beyond a reasonable doubt that the defendant willfully, during the period between October 1959 and May 24, 1961, served as a [fol. 602] member of the executive board of a labor organization, and at the same time he was a member of the Communist Party. The word "willfully" means no more than that the forbidden act is done deliberately and with knowledge..

You will note that the acts charged in the indictment are alleged to have been done unlawfully. "Unlawfully" means contrary to law. Hence to do an act unlawfully means to do willfully something that is contrary to law.

I instruct you that as a matter of law, the Executive Board of Local 10, ILWU, is an executive board of a labor organization within the purview of the statute. One of the essential elements which the Government must prove beyond a reasonable doubt is that the defendant was, at some time during the period alleged in the indictment, a member of the Communist Party while serving as a member of the Executive Board of Local 10, ILWU. Whether or not the defendant was a member of the Communist Party during the times alleged in the indictment is a question of fact which you are to determine from all the evidence in the case.

In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

Membership in the Communist Party, the same as membership [fol. 603] ship in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present a desire on the part of the individual to belong to the Communist Party and a recognition by that party that considers him as a member. Intent is a state of mind which can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party during the times alleged in the indictment, you may take into consideration the acts and statements of this defendant as disclosed by the evidence, bearing in mind the individual and unrelated, isolated acts of the defendant showing cooperation with the Communist Party, or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in the case.

In determining whether or not the defendant was a member of the Communist Party during the time alleged in the indictment, you may take into consideration whether the defendant paid dues; secondly, attended Communist Party meetings, conferences or other types of Communist Party gatherings; third; had made himself subject to the discipline of the Communist Party in any form whatsoever; [fol. 604] fourth, participated in any recruiting activities on behalf of the Communist Party; fifth, has acted as an agent or in any other capacity in behalf of the Communist Party; sixth, has been accepted, to his knowledge, as an officer or member of the Communist Party, or as one to be called upon for service by other officers or members of the Communist Party generally; seventh, has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the Communist Party generally; eighth, has spoken or in any other way communicated orders, directives or plans of the Communist Party; ninth, has advised, counseled, or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone

else in behalf of the Communist Party generally; tenth, has indicated by word, action, conduct, writing or in any other way, a willingness to carry out in any manner, to any degree, the plans, objectives or designs of the Communist Party generally; has in any other way participated in the activities, planning or actions of the Communist Party generally. These are some of the indicia of Communist Party membership. But you are not limited solely to those that I have enumerated.

As sole arbiters of the fact, it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendant was a member of the Communist Party during the dates alleged in the indictment. In determining this question, you must [fol. 695] bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find the Government has sustained its burden by proving beyond a reasonable doubt that the defendant was a member of the Communist Party during the dates alleged in the indictment, and if you find also that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged as I have outlined them to you, then you must find the defendant guilty.

We have prepared for your convenience—there has been prepared for your convenience, a form of verdict. It reads as follows:

“We, the jury, find Archie Brown, the defendant at the bar,” and then there is a blank, “of the offenses charged in the indictment.”

In that blank space your foreman, whoever that may be, will write your verdict, either “guilty” or “not guilty,” whichever is your verdict in the matter.

Whenever all of you agree to a verdict, it is the verdict of the jury. In other words, ladies and gentlemen, your verdict must be unanimous.

When you retire to the jury room to deliberate, you will select one of your number as a foreman or forelady, and he or she will sign your verdict for you when it has been agreed upon, and he or she will represent you as your

[fol. 606] spokesman in the further conduct of this case in this court.

And now, ladies and gentlemen, I would ask that you retire to the jury room. Do not begin your deliberations as yet. I will have you return to this court and instruct you when to begin your deliberations. But now please just return to the jury room.

(The following proceedings were then had outside the presence of the jury.)

The Court: Gentlemen, may I suggest at this time, if you have anything to bring before the Court, exceptions to instructions and so forth, that we do it now.

Mr. Poole: The Government has nothing, Your Honor.

Mr. Leonard: I take it, Your Honor, this is the time when, pursuant to Rule 30, it becomes necessary for the parties to state their objections to the Court's instructions, and I understand from Mr. Poole that the Government has no such objections.

The Court: That was his statement.

Mr. Leonard: All right, if the Court please, on behalf of the defendant, I want now to state the objections to the Court's instructions under Rule 30. For the sake of expediting the matter, I should like to incorporate by reference—I am not going to rest on this, Your Honor, but I should like for the record to incorporate by reference the entire discussion which was had in chambers yesterday between counsel and the Court with respect to these matters [fol. 607] and which appears in the transcript of the proceedings of yesterday at pages 479 to 518.

Supplementing that instruction at this time, I should like to state the following objections to instructions given by the Court. The defendant objects to the instruction which the Court gave to the jury that as a matter of law the Board upon which the defendant served is an Executive Board within the meaning of the statute. And in that connection the defendant points out that in his view this instruction took a question of fact from the jury and, pro tanto, the Court directed a verdict against the defendant. In this connection the defendant asks the Court to recall that instruction from the jury and asks the Court to give to the jury the defendant's Proposed Instruction No. 5, which, in es-

sence, states that the question of whether or not the Board upon which the defendant served is a board within the meaning of the statute is a question of fact for the jury to be determined from all the evidence in the case.

The second instruction which the Court gave to which the defendant objects is the instruction with respect to proof of membership in the Communist Party. This instruction presumably was based upon the decision of the Court in the recent Killian case. However, the objection is that with respect to most, if not all, of the items mentioned there was no evidence whatsoever to support the long recitation [fol. 608] which was contained in the instructions, and that it was, therefore, prejudicial to the defendant. In this connection we point out to the Court that these items were not even argued by the prosecution in either Mr. Vincent's or Mr. Poole's summation to the jury. Furthermore, specifically with respect to Items Nos. 6, 7, 9, 10 and 11, the Court adds something to the instruction which was approved in Killian and which we say is not material for the reasons I have already stated, for the reason that the Court added something to even those instructions when, with respect to those specifically numbered items, in each case it added the word "generally." I don't know what the word "generally" means. The word "generally" is not in the statute and the word "generally" is not in the Killian decision, and I submit that the addition of that word is simply going to confuse the jury, and it adds an element which is not approved or supported by law.

We object to the failure of the Court in its instructions on reasonable doubt to give the second paragraph of Instruction No. 2.01 as it appears in 27 Fed Rules Decisions at page 48, which reads, and for the record I read it:

"A substantial doubt is a fair doubt based upon reason and common sense and arising from the state of the evidence. It is rarely possible to prove anything to an absolute certainty. Proof beyond a reasonable doubt is established if the evidence is such as you [fol. 609] would be willing to rely and act upon in the most important of your own affairs."

And particularly the failure to give the last sentence of the paragraph: "A defendant is not to be convicted on mere suspicion or conjecture."

We object to the failure of the Court and to the omission of the Court in reading the statute—the omission of the use of the word "wilful." As I follow the Court's instruction, the Court instructed the jury that the service upon the Executive Board while a member of the Party was a violation of the statute. Subsection (b) of the statute says that there must be a wilful violation before there may be an offense, and the Court did not so instruct the jury.

Now, with respect to the instructions that the Court did not give, the defense objects to the failure of the Court to give our Proposed Instruction No. 3 which, in essence—and I won't read it because it's in the record—which, in essence, states that the defendant had to have specific intent to infiltrate a trade union body for the purposes of disrupting interstate commerce before he could be found guilty of violating this Act.

We object to the failure of the Court to give our Instruction No. 4, which is also part of the record and which, in essence, states that the defendant had to be found to have a specific intent to obtain the trade union office for an unlawful [fol. 610] purpose by concealing from the membership his Communist Party associations or membership.

We object to the failure of the Court to give our Instruction No. 5(a), which is also part of the record, to the effect that before the jury could convict they had to find beyond a reasonable doubt that the defendant actually intended to use and did use his position on the union board to disrupt interstate commerce.

We object to the failure of the Court to give the definition of "unlawfully" which we proposed in our Instruction No. 6 and which was taken from Burdick on the Law of Crimes.

Similarly, we object to the failure of the Court to give our Proposed Instruction No. 7, which contains a definition of the word "knowingly" taken from Burdick on the Law of Crimes.

We object to the failure of the Court to give our Proposed Instruction No. 8, which, in essence, provides that before the defendant can be convicted there must be evidence which shows beyond a reasonable doubt that he has

a personal intention to use his position on the Executive Board for unlawful purposes.

We object to the failure of the Court to give our Instruction No. 9 either as originally proposed or as the record will show it was modified in chambers yesterday by us, which essentially states that the defendant, before he could be [fol. 611] convicted, must be shown to have a specific intent to violate the law.

We object to the failure of the Court to give our Instruction No. 10, which defines that specific intent. We object to the failure of the Court to give our Instruction No. 11, which contains a definition of "wilfully" as that word is defined in *Burdick on the Law of Crimes*.

We object to the failure of the Court to give our Instruction No. 12, which, in essence, states that intent is personal to the defendant and cannot be imputed to the defendant by a consideration of the acts or statements of other persons.

We object to the failure of the Court to give our Instruction No. 13, either as originally proposed or as modified in chambers yesterday. This instruction deals with the use of oral statements and caution to be used in applying oral statements, to prove the defendant's intent.

We object to the failure of the Court to give our Instruction No. 14, that the hypothesis of innocence applies to intent as well as to the other factors in the case—that is, hypothesis of innocence when the jury is considering circumstantial evidence.

We object to the failure of the Court to give our Instruction No. 15 either as originally proposed or as modified in chambers yesterday, which, in essence, states that if the [fol. 612] defendant believes that he was not acting in violation of law, the jury could consider that circumstance in determining his guilt or his innocence.

We object to the failure of the Court to give our Proposed Instruction No. 16, which, in essence, states that the prosecution must prove more than a probability as taken from *American Jurisprudence*; the citation of which is attached to the proposed instructions.

We object to the failure of the Court to give our Instructions Nos. 23 to 27, inclusive, which, in essence, provide that good faith reliance upon the advice of counsel may be con-

sidered by the jury in determining the guilt or innocence of the defendant or in determining his general intent.

With respect to instructions that the Court gave as they appear in 27 FRD, we object to the failure of the Court in giving the instruction on "unlawfully," which is 7.08 at page 92; the failure of the Court to give the last paragraph; and we object to the Court's only reading the first paragraph to the jury. The same is true with respect to the instructions on "wilfully," which is 7.10. The Court read the first paragraph to the jury but not the last paragraph, and we object to the failure to include that in the instruction. The same is true with respect to Instruction 7.06 on "knowingly." The Court read the first two paragraphs of the instruction to the jury but did not read the last paragraph [fol. 613]. All of those relate to the matter of specific intent, and we want the record to show that we object to the failure to give this.

Something Mr. Gladstein points out is actually broader than that. 7.06 relates to specific intent. Some of them relate to state of mind. But in any case, the Court neglected in each instance to read the last paragraph of the instructions, having read only the first portion of each of those instructions that are mentioned, and we object to the failure of the Court to read the last paragraph.

Do you have anything else?

Mr. Gladstein: No.

Mr. Leonard: Your Honor, I take it now the record is clear, Your Honor, that, as I understand it, the purpose of the rule is so that the defendant may apprise the Court of his position so that if the Court desires to or wishes to, it may make any corrections. Now, Your Honor is fully appraised of our position, I take it, so there can't be any question about that.

The Court: I don't think there is any question about it at all.

Mr. Leonard: As a result of our discussions yesterday.

The Court: Yes, certainly. I think we have understood each other and our positions.

Mr. Leonard. Very well.

Mr. Poole: Your Honor, may I make one statement for [fol. 614] the record at this time?

The Court: Yes.

Mr. Poole: Except in one respect, I think the objections made by counsel are in line with those which were made, or those that were disposed of yesterday out of the jury's presence in chambers. There is one matter which he raised which has to do with Your Honor's reading of the instruction offered by the Government concerning membership in the Communist Party and I think it only fair that the record show that in those particulars—and I think this relates to No. 6 through, perhaps, 11, where Your Honor, at the end of the various items read the word "generally." As Your Honor will recall, in the redrafting of this instruction pursuant to our discussion in chambers, the Government undertook to show by reference to pages of the transcript—

The Court: That's correct.

Mr. Poole:—where these matters were supported by evidence, and that some places it was our opinion that the itemization was generally supported. Now, I don't know how this could leave the jury in any confusion. If Your Honor believed it of sufficient importance to read again without this, or to tell the jury that the word "generally" was not part of the instruction, we would have no objection—except I think this would unduly emphasize, perhaps.

The Court: I feel it would.

[fol. 615] Mr. Poole: That is, the itemization.

The Court: I don't want to read the items again. I think it is more important that we do not. I think the word is without meaning and the exception is in the record.

Mr. Poole: I do not believe it changes the meaning whatever, Your Honor.

The Court: The exception is in the record. All right, bring the jury back.

Mr. Gladstein: Do I understand Your Honor is not going to give any further directions?

The Court: No, I said I would not.

[fols. 616-618] The Court: Ladies and gentlemen, have you agreed upon your verdict?

The Jury Foreman: We have, Your Honor.

The Court: Would you hand it to the Marshal, please?

(The form of verdict was conveyed to the Court through the Marshal and the Clerk.)

The Court: Mr. Clerk, read the verdict.

VERDICT

The Clerk: Ladies and gentlemen of the jury, hearken to your verdict as it shall stand recorded:

"We, the jury, find Archie Brown, the defendant, at the bar, guilty of the offenses charged in the indictment. (Signed) John B. Zanini."

So say you all?

The Court: Desire to have them polled?

Mr. Gladstein: Poll the jury, if Your Honor please.

The Court: Yes, surely.

(The jury was then polled by the clerk.)

The Clerk: The verdict is unanimous, Your Honor.

The Court: Yes.

[fol. 619] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
December 12, 1963 (omitted in printing)

[fol. 620] IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 18,005

ARCHIE BROWN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Upon Appeal from the United States District Court for
the Northern District of California, Southern Division

OPINION—June 19, 1964

Before: Chambers, Barnes, Hamley, Jertberg, Merrill,
Koelsch, Browning and Duniway, Circuit Judges

MERRILL, Circuit Judge:

This appeal challenges the constitutionality of § 504 of the Labor Management and Reporting Act (29 U.S.C. § 504) which makes it unlawful for a member of the Communist Party to hold office in a labor union.

The section is set forth in the margin.¹ It will be noted [fol. 621] that the criminality is achieved in two stages:

¹ § 504. Prohibition against certain persons holding office; violations and penalties.

(a) No person who is or has been a member of the Communist Party or who has been convicted or, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive, board or similar governing body, business agent, manager, organizer, or other employee (other

First, the holding of such office by a member of the Communist Party is prohibited as a regulation of interstate commerce; second, the violation of this regulatory prohibition is made a crime.

Section 504 was enacted in 1959 as part of the Labor Management Reporting and Disclosure Act and is the successor of § 9(h) of the Taft-Hartley Act, which was then repealed. The latter section barred the facilities of the National Labor Relations Board to any labor organization the officers of which failed to file with the Board affidavits that they were not members of or affiliated with the Communist Party.

There can be little doubt, in the light of the legislative history of § 504, that it was designed to achieve the same Congressional objectives as former § 9(h) and achieve them [fol. 622] more effectively.² The purpose of the former sec-

than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

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during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment * * *.

(b) Any person who wilfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

² See H.R. Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess., 33-35, 79 (supplementary views), I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 791, 837. The original bill as it passed the Senate on April 25, 1959, contained no criminal disability provision relating to Communists. See S. 1555, 86th Cong., 1st Sess., § 305(a) (1959), and S.Rep. No. 187 on S. 1555 at 12-13. The Senate recognized the defects of the affidavit procedure then in use, but sought to make detailed changes with respect to the time for filing, the role of the N.L.R.B. in administering the procedure, etc., while preserving the affidavit framework for control of Communists in the labor unions. S. Rep. No. 187, *supra*, 36-37, I Legislative History, *supra*, 430-432. It was the House bill, H.R. 8342, passed in July of 1959, which first contained a prohibition against

tion and the evils Congress intended it to combat were fully explored by the Supreme Court in *American Communications Assn. v. Douds* (1950), 339 U.S. 382. There the court stated, at pages 388-389:

"One such obstruction, which it was the purpose of § 9(h) of the Act to remove, was the so-called 'political strike.' Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. . . . It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action."

Section 504, then, was enacted in a continuing effort by Congress, in its regulation of interstate commerce, effectively to prevent the interruption of a free flow of commerce by political strikes.

Appellant has been a member of the Communist Party since at least 1935. In elections for the years 1959, 1960 and 1961, he was, while a party member, elected a member of the Executive Board of Local 10 (San Francisco, Cali-

Communists holding office in labor unions together with a repeal of 9(h). See §§ 201(3) and 504(a) of H.R. 8342, *supra*. In conference the House amendment to the Senate bill S. 1555 was agreed to with various substitutions, including an added criminal sanction against any labor organization or official thereof knowingly permitting any person to violate § 504. See Confce. Rep. 1147 on S. 1555, 86th Cong., 1st Sess., 36 (1959), 1 Legislative History, *supra*, 940.

fornia) of the International Longshoremen's and Warehousemen's Union. Thereafter, while a party member, he served in this official capacity. He was thereupon indicted for a violation of § 504. He was tried and convicted and this appeal is taken from judgment of conviction.

Before we reach the constitutional problems which the appeal presents, it is necessary to deal with a matter of statutory construction. Appellant contends that the executive board of the local to which he was elected is not a "governing body"; that it is not the sort of "executive board" to which the status applies.

[fol. 623] The court instructed the jury that the Union's executive board was an executive board within the meaning of the statute. Appellant assigns as error the action of the district court in taking this question from the jury and in refusing to instruct the jury that it had to find that the board had power to impose its policies upon the Union and thus to engage the Union in activities which might disrupt the flow of commerce.

Two questions are presented by these contentions. First, was a jury question presented as to whether or not the executive board of the Union was an "executive board or similar governing body" within the meaning of the statute? Second, if not—if this question was a question of law—was it correctly answered by the court? Upon both issues we agree with the district court.

As to the nature of the Union's board we find no factual dispute to be resolved. The constitution of Local 10, setting forth the nature and powers of the executive board, was put in evidence and was read to the jury by appellant's counsel.³ Appellant introduced testimony to show that the ex-

³ The Constitution described the executive board as "the advisory board of the Local," and provided that its powers and functions were: "to adopt such measures as are deemed necessary from time to time for the good and welfare of the local, subject to the approval of the membership; * * * attend to all matters referred to it by the local, also suggest remedies for immediate and permanent benefit and report to the regular meeting; * * * dispose of communications not of interest to the local and cooperate in every way so that the business to be covered at a regular meeting may

ecutive board was primarily a recommending body whose resolutions were subject to review (and rejection) by the total membership before being translated into action.

We may accept as true all factual contentions asserted by appellant to have been established by this proof; specifically, that the board was without power on its own authority to bring about the evil with which Congress was concerned.

The true issue presented by the contentions of appellant was not as to the authority actually possessed by the Union [fol. 624] board, but whether a board having the nature and powers specified by the local's constitution for this board, even though limited in its powers as factually contended by appellant, was an "executive board or similar governing body" within the meaning of the statute. This was a question of law.

Upon that question we note first that under the local's constitution the "executive board" was an integral part of the frame of government set up by the document for the local.

In our judgment appellant reads § 504 too narrowly in attempting to confine "executive board" or "governing body" to one which, on its own authority, could take or require action threatening an interruption of commerce. While the statute was designed to strike at such interruptions its concern was not limited to those of executive authority who might by executive order accomplish such interruption. It included as well those who might by their position or office have power to influence such a result.

We note further that by specifying "any executive board" as well as "director" Congress apparently intended to include boards with a scope of authority different from that ordinarily possessed by a corporation's board of directors. By including within the prohibition all employees save those performing exclusively clerical or custodial duties, it has clearly manifested its desire to bring within the purview of § 504 persons other than those who ultimately control the unions.

be accomplished; * * * In cases of emergency * * * to act to protect the interests and welfare of the local; * * * study the labor movement closely and formulate concrete policies to strengthen our local—said policies to be in accord with the I.L.W.U."

We also note that this Act and this section apply to persons convicted of certain crimes as well as to Communist Party members. Congress' wish to rid labor unions of racketeering and corruption by driving out criminal elements cannot reasonably be said to be restricted to upper-echelon positions of real power.

We conclude that the district court did not err in instructing jury as it did.

This brings us to a consideration of the constitutional issue: whether criminal punishment of any and all Communist Party members who become union officers, regardless of lack of intent to bring about the evil the statute was designed to prevent or to further other unlawful aims of the Party, infringes the guarantees of the First and Fifth Amendments.

[fol. 625] The district court, in denying motions to dismiss the indictment and for acquittal, held that no proof of specific intent of any kind was necessary under the statute and that so construed the statute was constitutional.⁴

We turn first to a consideration of the question whether, as so construed, this regulation constitutes an impermissible restraint upon appellant's First Amendment "freedom of association for the purpose of advancing ideas and airing grievances." *Bates v. Little Rock* (1960) 361 U.S. 516, 523. In support of the district court judgment the Government relies upon *American Communications Assn. v. Douds*, *supra*. There it was stated, at page 390:

"There can be no doubt that Congress may, under its constitutional power to regulate commerce among the several States, attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce."

It held that Congress could attempt to prevent Communists from serving as union officers by legislation providing that the important benefits of the National Labor

⁴ The district court rejected appellant's offer of evidence that he had no intent to bring about any substantive evil, and it refused to give requested instructions requiring a finding of such intent.

Relations Act, including access to N.L.R.B. facilities, should be denied to unions having any Communist officers.

The Government urges that from this it follows that Congress, in order to make more effective its remedy for the conditions it could thus reasonably have found, could also impose personal criminal sanctions on this same general basis of political affiliation, by providing that mere membership in the Communist Party, when combined with union officership, is conclusive of guilt. We cannot agree.

At least grave doubt is cast upon such a contention by the more recent Supreme Court decisions in *Scales v. United States* (1961) 367 U.S. 203, and *Noto v. United States* (1961) 367 U.S. 290. The thrust of these decisions was that a criminal conviction for becoming a member of an organization advocating overthrow of the government—in these cases the Communist Party—can escape First Amendment condemnation only if in each case it is proved [fol. 626] (1) that the organization was engaged in the type of advocacy, of action to accomplish overthrow, that is unprotected by the First Amendment, and (2) that the defendant was an “active” member of such an organization with a specific intent to further such unlawful purposes. The court’s rejection of membership per se as a constitutionally sufficient ground of conviction was based upon the recognition, also voiced in *Doubs*, 339 U.S. at 393,⁵ that the Communist Party has both legal and illegal aims and carries on both legitimate and illegitimate activities, and the further recognition that there may be members “for whom the organization is a vehicle for the advancement of legitimate aims and policies” alone. “If there were a * * * blanket prohibition of association with a group having both legal and illegal aims,” the court reasoned, “there would indeed be a real danger that legitimate political expression or association would be impaired.” *Scales v. U.S.*, *supra*, 367 U.S. at 229, for “one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unpro-

⁵ 339 U.S. at 393: “Communists, we may assume, carry on legitimate political activities.”

ted purposes which he does not necessarily share." *Noto v. U.S.*, *supra*, 367 at 299-300.

In *Douds* the court, at page 400, states the problem posed by that case as follows:

"In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9(h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.' *Schneider v. State*, 308 U.S. 147, 161 (1939)."

[fol. 627] In discussing the extent to which the holding in *Douds* bears upon the present case it is essential that the dimensions of the restraint (both in that case and in ours) be examined.

In one respect the dimensions coincide: how far into the rights involved the restraint cuts.

The court in *Douds*, at page 402, notes:

"The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief."

The restraint involved simply a loss of the right to hold union office—what the court refers to as "loss of position."

However, the court makes clear that lack of direct restraint upon Communist Party membership does not eliminate the First Amendment problem. At page 402 the court states:

"But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines,

injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."

That loss of position by virtue of Communist Party membership is not to be confused with the usual conflict-of-interest situation is pointed out by the court at pages 392-393:

"If no more were involved than possible loss of position, the foregoing would dispose of the case. But the more difficult problem here arises because, in drawing lines on the basis of beliefs and political affiliations, though it may be granted that the proscriptions of the statute bear a reasonable relation to the apprehended evil, Congress has undeniably discouraged the lawful exercise of political freedoms as well. * * * By exerting pressures on unions to deny office to Communists and others identified therein, § 9(h) undoubtedly lessens the threat to interstate commerce, but it has the further necessary effect of discouraging the exercise of political rights protected by the First Amendment. Men who hold union offices have little choice but to renounce Communism or give up their offices. Unions which wish to do so are discouraged from electing Communists to office. To the grave and difficult problem thus presented we must now turn our attention."

In a second dimension—the quality of the restraint—the restraint confronting us is larger than that in *Douds*. There the court notes, at page 389:

"The unions contend that the necessary effect of § 9(h) is to make it impossible for persons who cannot sign the oath to be officers of labor unions."

This the court denies, stating at page 390:

"The statute does not, however, specifically forbid persons who do not sign the affidavit from holding positions of union leadership nor require their discharge from office. * * * We are, therefore, neither

free to treat § 9(h) as if it merely withdraws a privilege gratuitously granted by the Government, nor able to consider it a licensing statute prohibiting those persons who do not sign the affidavit from holding union office. The practicalities of the situation place the proscriptions of § 9(h) somewhere between those 'two extremes.'

The quality of the restraint in *Doubs* was an indirect "discouragement" obtained through pressure applied to the union. In the language of the court, at page 412, it was "to encourage unions to displace them [Communist Party members] from positions of great power"

In our case the restraint is imposed directly upon the individual. It is not discouragement. It is one of the "extremes": flat prohibition.

In our judgment, yet a third dimension of the restraint must also be considered: the force with which it is applied. The court in *Doubs*, at page 409, states:

"To hold that such an oath is permissible, on the other hand, is to admit that the circumstances under [fol. 629] which one is asked to state his belief and the consequences which flow from his refusal to do so or his disclosure of a particular belief make a difference. The reason for the difference has been pointed out at some length above. First, the loss of a particular position is not the loss of life or liberty. We have noted that the distinction is one of degree, and it is for this reason that the effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by Congress comports with the dictates of the Constitution."

Since it is the effect of a statute in restraining freedom of association with which we are concerned, we can hardly refuse to consider the consequences which are made to flow from a determined assertion of the rights in question in face of the regulation. In *Doubs* the sanction was not a personal one; it was applied to the union, withdrawing from the union its rights to the benefits of the National Labor

Relations Act. In our case, the sanction is not only personal, it is criminal. The imposing of a criminal sanction bears on the substantive quality of the restraint and poses new and different problems as to the reasonableness of the regulation. We are squarely faced with the principles enumerated in *Scales* and *Noto*.

This case, then, is far different from *Douds*. The restraint here bears directly upon the person of the one asserting First Amendment rights, and it does so with the duress of criminal sanctions.

It is with personal and forceful character of the restraint in mind that we approach the question faced in *Douds* and which faces us here: whether, in the absence of specific intent to accomplish that which Congress seeks to prevent, there is sufficiently close relationship between the regulation and the achievement of the Congressional objective.

In *Douds* the court, at page 406, states:

"It is contended that the principle that statutes touching First Amendment freedoms must be narrowly drawn dictates that a statute aimed at political strikes should make the calling of such strikes unlawful but should not attempt to bring about the removal of union [fol. 630] officers, with its attendant effect upon First Amendment rights."

This contention the court rejected, stating that "Congress should not be powerless to remove the threat, not limited to punishing the act." The court then concludes:

"While this statement may be subject to some qualification, it indicates the wide scope of congressional power to keep from the channels of commerce that which would hinder and obstruct such commerce."

In our judgment the regulation here—far broader than the threat it is designed to meet—is unreasonably broad. To relieve Congress from having to wait until it can punish the act, it is given power not simply to remove the threat but to punish it; and with no showing whatsoever that the act in fact is threatened by the person punished.

We conclude that this statute as construed by the district

court constitutes an invalid restraint upon the freedom of association protected by the First Amendment.

Since § 504 involves criminal punishment, we are also faced with serious problems of due process under the Fifth Amendment, which were not before the Supreme Court in *Douglas*. The question raised by § 504 is similar to that stated, as follows in *Scales v. U. S.*, *supra*, 367 U.S. at 220: whether the section "impermissibly imputes guilt to an individual merely on the bases of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct."

Upon this question the court in *Scales* stated at pages 224-225:

"In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment."

[fol. 631] And further, page 226:

"... the enquiry here must direct itself to an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability."

And further, page 227:

"It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that 'act' alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing."

In our judgment these constitutional standards of criminal imputability from association to individual are not met unless § 504 could be read as restricted to party members harboring specific intent to use union office to interrupt interstate commerce or actively and purposefully participating in furtherance of illegal party activities aimed at overthrow of the Government.

It is true that in *Scales* and *Noto* the court was faced with a statute which attributed to an individual member of an organization, seemingly on the basis of membership alone, criminal conduct in which the organization was found to be engaged.

Here, it is argued, criminality is not based solely on attribution from association; there is an individually and knowingly performed act—that of becoming a union officer—for which punishment is imposed.

We feel that this is not a valid point of distinction. In *Scales* the defendant might have been said to have knowingly and individually violated the law through his act of association. (He was indicted for being a member of the party with knowledge of its illegal purpose.) But this was not the gist of the crime—of that which society had found offensive. The gist of the offense was the advocacy in which the organization was engaged.

[fol. 632] So here, the gist of the offense (and, indeed, the sole basis for federal concern) lies in the anticipated efforts of the individual to use union authority or influence to bring about union action which would interfere with commerce. This, to quote from *Scales, supra*, is “the underlying substantive illegal conduct.” It is the relationship of Communist union officers to this potential disruptive and illegal activity which alone can justify the punishment imposed by § 504. In our judgment that relationship is not sufficiently substantial to justify, under the due process clause, imposition of criminal punishment on the basis of union officership combined with Communist Party membership per se.

We conclude that the relationship between the conduct or status punished and the evil intended here to be prevented is not sufficiently close to substantial to meet the requirements of either the First or Fifth Amendments unless § 504 can be construed as requiring proof either

that the defendant has specific intent to use his union office to attempt to disrupt interstate commerce or that he is an active member of the Communist Party with specific intent to promote unlawful party advocacy and action directed toward overthrow of the Government.

We feel it clear that this statute is not susceptible of such a limiting judicial construction.

It is true that in *Dennis v. U. S.* (1951) 341 U.S. 494, *Yates v. U. S.* (1957) 354 U.S. 298, and *Scales v. U. S.*, *supra*, criminal statutes, as applied to Communist activity or membership, were construed narrowly to include requirements of intent and unlawfulness of advocacy that were sufficient to remove doubts as to the constitutionality. But in each case ambiguous statutory language made such construction available.⁶

[fol. 633] Here we are not faced with ambiguous statutory expression but with a lack of expression. The segregation of guilty from what we have held must be innocent holding of union office is not at all suggested by the statutory language. It is wholly inappropriate to consider whether scienter should be deemed essential, for the very nature of the scienter that is constitutionally necessary is hidden. No Communist Party member could know, from a reading of the statute, whether, of the many party purposes, those

⁶ Thus *Dennis* held that proof of intent to overthrow the Government by force was an essential element of both § 2(a)(1) of the Smith Act (making it unlawful "to knowingly or willfully advocate . . . or teach" forceful overthrow of the Government), and § 2(a)(3) of the Act (making it unlawful "to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage" such overthrow). The opinion of Chief Justice Vinson, for four members of the court, declared that implicit in the very nature of advocacy of and organization for advocacy of overthrow is an intent to bring about that overthrow. 341 U.S. at 499. *Scales* involved conviction under the Smith Act clause making it unlawful to become or be a member of any such society advocating or teaching overthrow of the Government, "knowing the purposes thereof." The court declared that the reasoning in *Dennis* "applies equally to the membership clause," and held that

which he personally embraces do or do not disqualify him from union office or employment.

Not only then, is the statute overbroad. It is so wholly lacking in notice of the constitutionally essential components of the crime that it cannot be judicially narrowed.

We conclude that § 504 of the Labor Management and Reporting Act, in its imposition of criminal sanctions upon Communist Party members, must be held to conflict with the First and Fifth Amendments to the United States Constitution, and upon this ground to be void.

Reversed and remanded with instructions that judgment be set aside and the indictment dismissed.

[fol. 634] DUNIWAY, Circuit Judge (Concurring):

I concur in the opinion of my brother Merrill. However, because I do not think that his opinion sufficiently answers the arguments advanced by my brother Hamley, I feel obligated to state my views as to those arguments.

I think that the question raised by my brother Hamley is not quite the question that this case presents. In my opinion, if a particular executive board, under the constitution or bylaws of other governing instruments of the union, has powers that bring it within the meaning of 29 U.S.C. § 504 ("executive board or similar governing body"), then it makes no difference that, in practice, the executive board does not exercise some of those powers. It would still have the right to exercise them. I think that

the clause requires proof of specific intent to further illegal and constitutionally unprotected party activities directed toward forcible overthrow of the Government. In *Yates*, *Scales* and *Noto v. U. S.*, *supra*, the court, by construing the word "advocate," held that the activity which is punishable by the first clause of the section and in which the organization must engage to warrant punishment of its members under the membership clause, is "advocacy 'not of * * * mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to * * * action' immediately or in the future." *Noto v. U. S.*, *supra*, 367 U.S. at 297, quoting from *Yates v. U. S.*, *supra*, 354 U.S. at 316.

Congress was aiming at membership in a board having such a right. Therefore, the court could properly look to the union constitution, which was the only governing instrument in evidence. I also think that, assuming that the copy of the constitution in evidence is in fact the constitution, and that it is a correct copy, the question as to whether the executive board is one falling within the statute is a pure question of law. It is not transmogrified into a question of fact because the defendant contends that the board does not fall within the statute. If, in a particular case, the government sought to show that a board in fact had and exercised *more* power than the constitution gave it, the question might be different, but it is not before us.

I cannot tell from Judge Hamley's opinion whether he bases his statement that the question is one of fact upon a construction of the union constitution or upon the evidence offered by the union to show that, in practice, the board did not exercise the full powers that the constitution conferred upon it. If his statement refers to a construction of the constitution, then I think that he is plainly wrong. The meaning and effect of such a document has always been considered a question of law. If his statement refers to the union's evidence as to practice, where, as here, the practice is introduced to show that the board exercises less power than it has, my answer is that, as a matter of law, such practice is immaterial; it would have been improper for the jury to base its decision on that evidence, and the trial judge should have excluded it. Its admission is not [fol. 635] an error of which Brown can complain, nor, *a fortiori*, is it an error to fail to tell the jury that it should consider that evidence in deciding whether the executive board was such a board as is referred to in the statute. To tell the jury that would have been error.

Here, as Judge Merrill points out, there was no controversy as to the authenticity or accuracy of the copy of the union's constitution that was in evidence. These facts were "admitted" just as fully and effectively as if there had been a formal stipulation about them. So, in my view, the only question left on this phase of the case, was one of law.

If I am in error in the foregoing analysis, however, I think that the result would be the same. I agree with Judge Merrill that, even if we accept as true all of the factual

contentions of appellant as to this issue, the question is still one of law.

The dispensing power of the jury—its power to decide a criminal case for the defendant, against both the law as stated by the judge and the facts as shown by the evidence, is long established. I think that it lies at the heart of the problem that is here presented. But it does not, in my opinion, require a reversal here.

My view is supported by high authority. In *Horning v. District of Columbia*, 1920, 254 U.S. 135, defendant was charged with violation of a District of Columbia law forbidding pawnbroking at interest in excess of 6%. Defendant admitted that he was pawnbroking, but denied that he was doing so within the District. He testified that he warehoused pledges in the District, but granted loans and signed contracts only in Virginia. He maintained an automobile service to transport customers across the bridge to his office. The court charged that, on that state of facts, he was a pawnbroker in the District. Defendant claimed that the court thus effectively decided against his only defense. Mr. Justice Holmes affirmed:

“This is not a case of the judge’s expressing an opinion upon the evidence, as he would have had a right to do The facts were not in dispute, and what he did was to say so and lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the [fol. 636] teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found Perhaps there was a regrettable peremptoriness of tone—but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand.” (pp. 138-39)

This court has come to a similar conclusion in *Peterson v. United States*, 9 Cir., 1925, 4 F.2d 702. Defendant, charged with illegally possessing and selling whiskey, ad-

mitted possessing the liquor under circumstances that he claimed were not illegal. The charge advised the jury that defendant's testimony admitted illegal possession. Affirmed: "In declaring that the possession was unlawful, the court did no more than to state the law applicable to the admitted facts." (p. 702)*

Nordgren v. United States, 9 Cir., 1950, which is discussed by Judge Hamley, also seems to me to be squarely in point. There is no claim that, in the present case, the court did not do what trial judges invariably do, and what the trial judge did in *Nordgren*, namely, tell the jury that it was their sole province to determine the facts. The judge did so instruct the jury, not once, but three times. This case does differ from *Nordgren* in one respect, namely, that here the court was asked to tell the jury that the question of whether the executive board was such a board as the statute refers to was a question of fact for them to decide. The court's reference to the lack of such a request, in *Nordgren*, is at most, only an alternative ground of decision, and, more realistically, a sort of bolstering afterthought.

See also the decision of Judge Gilbert in *May v. United States*, 9 Cir., 1907, 157 Fed. 1, 5-6. I can find no persuasive basis on which to distinguish these cases from the one before us.

In attempting to hew a path between "law" and "fact" it is difficult if not impossible not to lapse into semantics. I suppose no one would argue that it is not the judge's province to interpret a statute for the jury—this is a "question of law," and one on which he is the expert. I do not think that, in doing so, he is required to limit himself to bland abstractions, although that is what most judges [fol. 637] usually do. If a judge is to give effective guidance to the jury, he ought to be as specific in his instructions as the facts of the case allow him to be. I do not see why, in interpreting a statute, he may not state that an admitted board falls within the statute's reference to a board. Defendant's argument is, after all, one of legal analysis, and the judge is better able than the jury to evaluate it. And yet, when the judge personalizes his statutory interpretation to apply to defendant's situation when the question to be decided is a necessary increment in the determination of defendant's guilt, Judge Hamley would

call it a question of fact. Impliedly he would sacrifice expertise to protect the jury's discretion to decide irrationally.

I do not think that it aids analysis to argue, as does Judge Hamley, that it is error to direct a verdict in a criminal case (which it is) and that therefore an instruction which "takes a fact question away from the jury" is a partial direction and also error. This assumes too much. The vice in directing the verdict is that the jury is deprived of any opportunity to decide the case. Even though the judge does, in a sense, decide some issues through peremptory instructions of "law", the jury still gets the whole case for a final determination of guilt or innocence. When the jury entertains that final question in the privacy of the jury room its freedom is unrestricted. This is the dispensing power, and all must concede that if the decision is for defendant it is unreviewable and uncorrectable. In practice, it is no doubt less likely that the jury will exercise an independent choice on an issue presented to them as a matter of "law." But this only gets us back to the original problem: How far may the judge go in inducing responsible exercise of the dispensing power without unduly infringing on that power?

Perhaps this question can be narrowed still further. Judge Hamley distinguishes, and seems to approve, cases which involve, not peremptory jury instructions, but only "permissible comment" by the trial judge. But I suggest that the fact that a federal judge is given some latitude of permissible comment is a commitment against the irrational verdict and a not inconsiderable impingement on the jury's discretion. Conceding that a jury might feel less compulsion to follow a judge's considered opinion than his peremptory instruction "as a matter of law," I doubt whether [fol. 638] the difference in effect often is or ought to be substantial. Mr. Justice Holmes addressed himself to this point in *Horning v. District of Columbia*, *supra*, and clearly was not troubled by it. Nor was this court in *Peterson v. United States*, *supra*.

I do not see that the method adopted by the trial judge here, which finds support in decisions of this circuit and the only Supreme Court case that seems in point, constitutes any significant abridgement of the defendant's right to

trial by jury. Moreover, I respectfully suggest that the cases upon which Judge Hamley relies do not as strongly support the result that he would reach as his opinion indicates that they do.

Most clearly distinguishable is *Sullivan v. United States*, D.C. Cir., 1949, 178 F. 2d 723. Defendant was charged with "forging and uttering a physician's prescription for a narcotic drug" for the purpose of defrauding the United States. He admitted that he forged the prescription and presented it at a drugstore, but denied his intent to obtain a drug. The charge nevertheless told the jury that he had admitted "forging and uttering" within the statutory definition. This was reversed on appeal, because the admitted conduct was not within the statute unless there was intent to obtain narcotics, and that intent was denied. Clearly this case is one in which the court either erroneously stated the law, or, as the court seems to have treated it, assumed a fact on which defendant had testified to the contrary.

United States v. Manuszak, 3 Cir., 1956, 234 F. 2d 421, is distinguishable on a different ground. The question there was defendant's guilt on a charge of interstate shipment of stolen goods. The government introduced witnesses to prove the theft, interstate movement, and defendant's involvement. The defense was that the accused was not the man, and knew nothing about the events. The court charged that there was no question that a theft had taken place and the only question was whether defendant had been improperly identified as a participant. This was held reversible error because the theft was a necessary element, and its existence was for the jury. But it is clear that the appellate court was concerned that all evidence proving the theft was put on by the government. Overwhelming as it was, and uncontested, there was still the question of credibility, and this is always for the trier of fact. Where as in [fol. 639] the present case defendant affirmatively accepts and relies on the evidence which establishes an issue in the case, the credibility aspect is absent. Note also that in *Matuszak*, the question decided by the court was one of "physical fact" not legal significance. The question was: "Did certain acts take place"; not "did these admitted acts amount in law to theft"? The former question is not

one which the judge has any special competence to answer by virtue of his legal training and experience; the latter is.

The same analysis, the significance of credibility, may explain *United States v. McKensie*, 6 Cir., 1962, 301 F. 2d 880, and *Roe v. United States*, 5 Cir., 1961, 287 F. 2d 435. *McKensie* presents the same problem as *Manuszak*; defendant charged with possession of illicit whiskey; government witnesses testify as to the crime, and identify defendant as a participant; defendant denies his presence and any knowledge of the alleged acts. One must believe the government witnesses to believe anything took place at all, as well as that defendant was a party. In *Roe*, the charge was sale of securities without registration. The items sold were mineral leases, which defendants claimed were not "investment contracts," and hence not "securities" within the 1933 Act. The Court of Appeals first analyzed the evidence (without indicating which side had produced it) and held, "as a matter of law, the evidence of these transactions, if credited, would "constitute" the sale of a security. (Emphasis mine) If, as seems likely, the summarized evidence was government evidence, the same credibility problem is present. It must be conceded, however, that the language in both of these cases suggests that the court would have reached the same result if credibility had not been in issue.

Brooks v. United States, 5 Cir., 1957, 240 F. 2d 905, is also explainable on the credibility point. The question assumed in the charge was the authority of an official, before whom defendant was alleged to have sworn falsely, to administer oaths. The official testified as to his authority and introduced his commission into evidence. The charge was that as a matter of law he was authorized. This was held to be error because it deprived the jury of the right to test the credibility of the witnesses, and to determine whether they believed the government's evidence beyond a reasonable doubt.

[fol. 640] A careful reading of *Carothers v. United States*, 5 Cir., 1947 161 F. 2d 718, suggests that this case undercuts, rather than supports, Judge Hamley's position. Defendants were charged with violations of OPA maximum price regulations. The trial court's charge assumed the charg-

ing of prices above the applicable maximums. As to one defendant, the court reversed, saying that the court below had directed a verdict as to a material fact. But it added that "the evidence as to the March 1942 maximum was quite meagre and unsatisfactory." On the other hand, it sustained the jury charge as to two other defendants because "the defendant's schedules and the administrator's order had fixed as a matter of law the selling price." (*Id.* at 722).

This leaves only *United States v. Raub*, 7 Cir., 1949, 177 F.2d 312. In this case both the charge below and the reversing opinion above are so cloudy as to leave me uncertain as to what principle was applied. Defendant was charged with willful evasion of taxes by the filing of a fraudulent return. His defense was an attempted justification of his return as accurate within the revenue statutes, coupled with a denial of fraudulent intent based on his acting on the advice of his attorney. The oral charge, as reproduced in the opinion, was in effect "No doubt he did what he was charged with, you must decide if it was with purpose or intent to evade taxes." The Court of Appeals held that this prejudged the essential issue of "fraud" and was reversible error. If by this the court meant that the judge might not instruct the jury that the return was false under the law, then this ruling is perhaps contra to the trial court's charge in the present case. But the opinion's ambiguous use of the word "fraud", which to me implies intentional wrongdoing, may suggest that the court was primarily concerned with weighting the question of willfulness against defendant. At best, *Raub* is not a careful or persuasive analysis of the problem.

In short, I think that the trial court's instruction was correct. It was short, sensible, direct, and fully supported by the conceded fact—the union constitution. It had the great virtue of not dealing in vague abstractions. The jury still had the dispensing power, which, as Justice Holmes pointed out, is a "power to bring in a verdict in the teeth of both law and facts." The charge in no way deprived it of that power.

[fol. 641] HAMLEY, Circuit Judge (dissenting):

Without reaching the constitutional question I would reverse and remand for a new trial. I would do so on the ground that the trial court erroneously and prejudicially decided a question of fact which should have been left to the jury, namely, whether the executive board of Local 10, I.L.W.U. is an "executive board" of a labor organization within the meaning of section 504 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 536, 29 U.S.C. § 504. This question of fact was decided by the court adversely to appellant when the court instructed the jury:

"I instruct you that as a matter of law, the Executive Board of Local 10, ILWU, is an executive board of a labor organization within the purview of the statute."

The trial court should have instructed the jury as to the meaning of the term "executive board," as used in section 504, leaving it to the jury to determine whether the executive board of Local 10 is an executive board in this statutory sense.

In my view, a union executive board within the meaning of section 504 is any internal body of a union which, under the constitution and by-laws of the union as understood and given effect by the members, has the power substantially to influence or affect action by the union threatening an interruption of commerce. Such a definition gives recognition to the underlying purpose of the legislation which, as pointed out by the majority, is "effectively to prevent the interruption of a free flow of commerce by political strikes."

As I read the evidence and consider the reasonable inferences therefrom, I believe it cannot be said that the evidence shows beyond dispute that the executive board of Local 10 had such power. But even if I am mistaken as to this, it is at the very least clear that appellant did not admit that the executive board of Local 10 had this power. This being true, it was improper for the trial court to decide the question as one of law.

Stating my view in the form of a general proposition, it

is this: A trial court may not take from the jury in a criminal case and decide adversely to the defendant, an essential question of fact put in issue by a plea of not guilty and not thereafter admitted, even where the prosecution's view of the fact is supported by overwhelming and undisputed evidence.

There is one decision by this court which may be thought to state a view contrary to that expressed above. This is *Nordgren v. United States*, 9 Cir., 181 F. 2d 718, involving a prosecution for offering and giving a bribe to a person acting for and on behalf of the United States in an official capacity. It was essential to conviction in that case that the person to whom the bribe was offered and given be a person acting for and on behalf of the United States in an official capacity. There was no dispute in the evidence as to this though the defendant did not concede the fact. The trial court instructed that the person was acting in an official capacity. Affirming, this court said (page 721):

"We think the charge was not error. There was, as already indicated, no controversy as to the facts pertaining to the functions MacKenzie was performing, and the charge did not misdescribe his duties. Moreover, appellant did not ask for an instruction submitting to the jury the question whether MacKenzie was performing an official function. The court in the course of its charge repeatedly informed the jury that it was their sole province to determine the facts."

The statement in this quotation that appellant failed to ask for an instruction submitting the question to the jury, suggests that if such an instruction had been requested it would have been held to be error for the court to take the question from the jury. In the case now before us appellant not only took appropriate exception to the instruction given, but specifically requested that the jury be told that this was a question of fact.

The statement in the quotation from *Nordgren* to the effect that the court repeatedly informed the jury that it was their sole province to determine the facts suggests that this court may have regarded the questioned instruction as in the nature of a permissible comment on the evidence rather than as a binding determination of fact. If so,

Nordgren cannot be regarded as authority for the proposition that a trial judge may take questions of fact from a jury in a criminal case where the evidence is undisputed. [fol. 643] Nevertheless, *Nordgren* has been construed by some courts as stating such a proposition. See *United States v. Lovely*, 4 Cir., 319 F. 2d 673, 682, note 11; *Schwachter v. United States*, 6 Cir., 237 F. 2d 640, 644.

Among the other circuits, only the Second appears to sanction the determination of questions of fact by the trial court in a criminal case, where the evidence is undisputed. Such a determination was given approval in *United States v. Mura*, 2 Cir., 191 F. 2d 886. This was a prosecution for transporting stolen cars in interstate commerce. The trial court instructed the jury: "The automobiles that the Government believes have been identified all crossed the border between New York and New Jersey. . . ." In sustaining this instruction the court stated that the evidence was conclusive, that the jury was not instructed that defendant transported the cars, and that the question of the defendant's guilt was left to the jury "under a perfectly impartial charge."¹

¹ There is another Second Circuit case, *United States v. Rainone*, 2 Cir., 192 F. 2d 860, which might appear to represent a similar holding. There was, however, no formal instruction, but only a remark by the trial judge to the effect that "there was not any question as to whether the automobile was taken from Brooklyn to Stamford." The court of appeals seems to have regarded this as permissible comment, stating that the record revealed nothing indicating that the defendant was adversely affected by the remark.

As pointed out above, our decision in *Nordgren v. United States*, may also fall in this category. *Dusky v. United States*, 8 Cir., 271 F. 2d 385, rev'd on other grounds, 362 U.S. 402, also appears to involve comment on the evidence rather than a categorical instruction resolving an issue of fact.

A contention that a court instruction took a question of fact from the jury will not be entertained in a collateral proceeding under 28 U.S.C. § 2255, at least where the evidence indisputably supports the instruction. See *United*

In the Third, Fifth, Sixth, Seventh and District of Columbia Circuits, involving all of the more recent decisions on the question, such an instruction has been held to constitute reversible error. See *United States v. McKenzie*, 6 Cir., 301 F. 2d 880;² *Roe v. United States*, 5 Cir., 287 F. 2d 435; *Brooks v. United States*, 5 Cir., 240 F. 2d 905; *United States v. Manuszak*, 3 Cir., 234 F. 2d 421; *Sullivan v. United States*, D.C. Cir., 178 F. 2d 723; *United States v. Raub*, 7 Cir., 177 F. 2d 312; and *Carothers v. United States*, 5 Cir., 161 F. 2d 718.³

Some discussion of a few of these cases will reveal the reasoning which has led a majority of the federal appellate courts to disapprove instructions deciding factual questions as if they were questions of law.

In *United States v. McKenzie*, the defendant was prosecuted for possessing distilled spirits, the immediate container thereof not having affixed thereto the required internal revenue stamps. The trial court, in effect, instructed the jury that the identification of appellant was the only issue left in the case. Reversing, the Sixth Circuit said (page 882):

"No matter how conclusive the evidence may be in a criminal case on a controverted material fact, the

States v. Lovely, 4 Cir., 319 F. 2d 673; *United States v. Jonikas*, 7 Cir., 197 F. 2d 675. And of course the trial court may instruct that a particular fact is undisputed if it was a fact admitted by the defendant during the trial. *Horning v. District of Columbia*, 254 U.S. 135; *Young v. United States*, 9 Cir., 286 F. 2d 13; *Peterson v. United States*, 9 Cir., 4 F. 2d 702.

² This decision is to be compared with two earlier Sixth Circuit decisions in one of which (*Schwachter v. United States*, 6 Cir., 237 F. 2d 640), such an instruction was also disapproved, and in the second of which (*Malone v. United States*, 6 Cir., 238 F. 2d 851), such an instruction was upheld.

³ I do not include in this list cases such as *Dixon v. United States*, 8 Cir., 295 F. 2d 396, where the evidence was in dispute. All courts appear to recognize that factual questions in a criminal prosecution cannot be decided by the trial court where the evidence is in conflict.

trial judge cannot make the finding or withdraw the issue from the jury."

In *Roe v. United States*, the defendant was prosecuted for the sale and delivery of securities through the use of the mails without prior registration. The trial court instructed the jury, on undisputed evidence that the documents which the defendant was charged with selling and delivering were investment contracts. Reversing, the Fifth Circuit said (page 440):

"... no fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our [vol. 645] federal system, the Trial Court may never instruct a verdict either in whole or in part."

In *Brooks v. United States*, the defendant was prosecuted for perjury. The trial court instructed the jury that a named special agent of the Internal Revenue Service was, at the time he was alleged to have administered an oath to defendant, authorized to administer oaths. Reversing, the Fifth Circuit said (page 906):

"... it [the instruction] deprived the jury of its function of determining whether or not, under the evidence and as exclusive judges of the facts and of the credibility of the witness, they believed beyond a reasonable doubt that Perry was an officer authorized to administer oaths in 1955 and this violated appellant's constitutional right to a trial by jury as guaranteed by the Sixth Amendment."

In *United States v. Mamuszak*, the defendant was prosecuted for theft of goods from an interstate shipment. One of the facts essential to conviction was that a theft of goods had occurred. The evidence was undisputed that there had been such a theft and the trial court so instructed the jury. Reversing, the Third Circuit said (page 424):

"The presumption of innocence to which appellant was entitled demanded that all factual elements of the government's case be submitted to the jury. It is immaterial that the government's evidence as to

the actual theft was uncontradicted. The acceptance of such evidence and the credibility of witnesses is for the jury, even though to the court the only possible reasonable result is the acceptance and belief of the government's evidence. A partial direction of the verdict occurs when the court determines an essential fact, and this denies the appellant trial by jury."

While the Supreme Court appears not to have dealt with the precise question, it has held that "... a judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 408. I agree with the Fifth Circuit's holding in *Roe v. United States*, and the Third Circuit's holding in *United States v. Manuszak*, that [fol. 646] when a trial court, in a criminal case, decides a factual issue as a matter of law, it is giving a partial direction of the verdict, and that this is forbidden under the rule prohibiting directed verdicts in criminal cases. If a verdict may not be directed on all issues, it may not be directed on any issue for the issue upon which direction is given may be, to the jury, the dispositive issue in the case.

If *Nordgren v. United States*, 9 Cir., 181 F.2d 718 is deemed to announce a contrary rule, I believe it should be overruled.

CHAMBERS, Circuit Judge, dissenting:

I agree with Judge Merrill insofar as he holds that Brown's executive board was one within the meaning of 29 U.S.C. § 504 and that it was correct for the trial judge to tell the jury so. Therefore, I would disagree with Judge Hamley's dissent that such was a jury question.

But as of now I would hold the statute constitutional. A far different case we would have if the statute proscribed a Communist party member's right to be a member of a union or to get a job.

I cannot agree that *Douds*, 339 U.S. 382; *Bates v. Little Rock*, 361 U.S. 516; *Scales v. United States*, 367 U.S. 203; and *Noto v. United States*, 367 U.S. 290, necessarily indicate we should declare § 504 unconstitutional.

I shall not repeat Judge Merrill's excellent summary of the Congressional reasons for adopting § 504.

All through our United States Code we find restrictions on conflicts of interest with criminal penalties therefor, only because experience has shown "a disposition to commit" on the part of executives. See 18 U.S.C. § 281, § 283; 38 U.S.C. § 1764(a); 38 U.S.C. § 1664; 18 U.S.C. § 1909; 12 U.S.C. § 377; 15 U.S.C. § 19; 12 U.S.C. § 1812; 15 U.S.C. § 78(d); 49 U.S.C. § 1321; and 49 U.S.C. § 11. The fact that a high percentage would discharge their duties without favoritism is to no avail. "Disposition of the class of persons to commit" is enough for the proscription.

Schware v. Board of Bar Examiners, 353 U.S. 232, holds: one cannot be barred from becoming a lawyer merely because one is or has been a member of the Communist party. [fol. 647] I would suppose though that an integrated state bar act might permissibly provide that one could not be an officer of that organization if he were a Communist.

One needs a basic right to a job. One doesn't need a right to be a union officer or to be an executive with a possible conflict of interest with his government.

BARNES, Circuit Judge, dissenting:

I concur with Judge Chambers, both in his agreement with Judge Merrill's opinion, and in his dissent therefrom, as well as his dissent with Judge Hamley on the jury question. I believe that the delicate "balance struck by Congress comports with the dictates of the Constitution." The "wide scope of congressional power to keep from the channels of commerce that which would hinder and obstruct such commerce" is not, to me, violative of § 504 here considered.

While a police officer or a congressional employee, under investigation, has a "right" to invoke the Fifth Amendment—he has no right to hold a particular job thereafter. Appellant herein had a right to be a certain kind of member in the Communist Party, but has no "right" to hold office in labor unions, which office directs the labor union's policy, once Congress has seen fit to refuse him such office holding. The congressional right to protect the full flow of interstate commerce must itself be protected; not at all odds, but when reasonably exercised, as I feel it here was. In this I disagree with the majority.

[fol. 648] IN THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 18,095

ARCHIE BROWN, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

JUDGMENT—Filed and entered June 19, 1964

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded with instructions that judgment be set aside and the indictment dismissed.

[fol. 649] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 650] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—July 17, 1964

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 18, 1964.

Arthur J. Goldberg, Associate Justice of the Supreme Court of the United States.

[fol. 651] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1964

No. 399

UNITED STATES, Petitioner,

v.

ARCHIE BROWN

ORDER ALLOWING CERTIORARI—November 9, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIE BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINION BELOW

The opinion of the court of appeals (Appendix, pp. 7-34 *infra*) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1964 (Appendix, p. 35 *infra*). On July 17, 1964, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including August 18, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 29 U.S.C. 504, which makes it unlawful for a member of the Communist Party to serve as an officer, director, trustee, or member of the executive board of a labor organization, is unconstitutional.

STATUTE INVOLVED

Section 504 of 29 U.S.C. provides in pertinent part:

§ 504. *Prohibition against certain persons holding office; violations and penalties.*

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, * * *

during or for five years after the termination of his membership in the Communist Party, or

for five years after such conviction or after the end of such imprisonment * * *

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

STATEMENT

Respondent was charged in a one-count indictment returned on May 24, 1961, with violation of 29 U.S.C. 504, in that from October 1959 up to and including the date of the indictment he knowingly and willfully served as a member of the Executive Board of Local 10, International Longshoremen's and Warehousemen's Union, while a member of the Communist Party (C.T. 1).¹ Upon trial by jury, respondent was found guilty and the district judge sentenced him to six months' imprisonment.

Evidence adduced at trial established that respondent was elected to the Executive Board of Local Ten of the ILWU in the years 1959, 1960, and 1961 (R.T. 22-27) and that he attended thirty-one regular and special meetings of the Board during the indictment period (Gov. Ex. 7; R.T. 31, 34, 36, 43, 58-81, 155).

Witnesses testified that respondent, during a public meeting at Stanford University on May 23, 1960, stated that "I have been a member of the Communist Party for 25 years and I am now a member of the Communist Party" (R.T. 209-213, 232, 235). Another government witness, who had been a member of the Communist Party, testified that she was present

¹ "C.T." and "R.T." refer to the clerk's transcript and reporter's transcript in the district court, respectively.

at 16 different Communist Party meetings with respondent during the indictment period (R.T. 239-241, 242-266). She further testified that respondent was chairman of the Rules Committee of both sessions of the District Convention of the Communist Party in November 1959 and February 1960 (R.T. 241-243, 247-250); was a delegate to the 17th National Convention of the Communist Party in New York City in December 1959 (R.T. 243, 263-266); attended a meeting of the delegates to the National Convention in San Francisco in late December 1959 (R.T. 244-246); attended and was active at numerous meetings of the District Committee of the Communist Party during 1960 and 1961 (R.T. 246-247, 250-263); and was chairman of a meeting of the Trade Union Commission of the Communist Party in December 1960 (R.T. 257-258).

On appeal, the original three-judge panel, *sua sponte*, ordered the case set for reargument before the court *en banc*. The court, by a vote of 5 to 3, ordered the conviction set aside and the indictment dismissed. The court ruled that Section 504, insofar as it relates to members of the Communist Party, is unconstitutional under the First Amendment and the due process clause of the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

A divided court of appeals has held that 29 U.S.C. 504 is unconstitutional in prohibiting members of the Communist Party from serving as union officers. This prohibition is part of a major revision of the

national labor laws enacted by Congress after long controversy and mature deliberation, not only with respect to the general problem of ensuring that labor unions vested with statutory power and encouragement should not be diverted from their proper functions but also with respect to the specific problem of preventing misuse of union power as a result of infiltration by the Communist Party. Under these circumstances, and because the statute has general and continuing importance, review by this Court is plainly warranted.

Section 504 of Title 29 U.S.C. is part of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 536. This specific provision replaces Section 9(h) of the Labor Management Relations Act of 1947, which required all officers of labor unions desiring to use the services of the National Labor Relations Board to file non-Communist affidavits. The latter provision was held constitutional in *American Communications Ass'n v. Douds*, 339 U.S. 382, 393, on the express ground that Congress could reasonably find that Communists "represent a continuing danger of disruptive political strikes when they hold positions of union leadership." The provision was highly controversial because it required a test oath of a particular class and because it appeared to subject many employees and their organizations to disabilities because of the conduct of a single official. In the intervening years Congress considered a number of proposals ranging from repeal to the extension of Section 9(h) to business organizations. As the court

below stated, Section 504 "was designed to achieve the same Congressional objectives as former Section 9(h) and achieve them more effectively" (Appendix, p. 8 *infra*). Thus, the holding of the *Douds* case makes it evident that, at the very least, the question presented as to the constitutionality of this section is substantial.

CONCLUSION

For the above stated reasons, we respectfully submit that the petition for a writ of certiorari should be granted.

ARCHIBALD COX,
Solicitor General.

J. WALTER YEAGLEY,
Assistant Attorney General:

KEVIN T. MARONEY,
GEORGE B. SEARLS,
Attorneys.

AUGUST 1964.

APPENDIX

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ARCHIE BROWN,

Appellant,

vs.

No. 18,005

UNITED STATES OF AMERICA,

Appellee.

[June 19, 1964]

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division

Before: CHAMBERS, BARNES, HAMLEY, JERTBERG,
MERRILL, KOELSCH, BROWNING and
DUNIWAY, Circuit Judges

MERRILL, Circuit Judge:

This appeal challenges the constitutionality of §504 of the Labor Management and Reporting Act (29 U.S.C. §504) which makes it unlawful for a member of the Communist Party to hold office in a labor union.

The section is set forth in the margin.¹ It will be noted that the

§504. Prohibition against certain persons holding office; violations and penalties

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer,

criminality is achieved in two stages: First, the holding of such office by a member of the Communist Party is prohibited as a regulation of interstate commerce; second, the violation of this regulatory prohibition is made a crime.

Section 504 was enacted in 1959 as part of the Labor Management Reporting and Disclosure Act and is the successor of §9(h) of the Taft-Hartley Act, which was then repealed. The latter section barred the facilities of the National Labor Relations Board to any labor organization the officers of which failed to file with the Board affidavits that they were not members of or affiliated with the Communist Party.

There can be little doubt, in the light of the legislative history of §504, that it was designed to achieve the same Congressional objectives as former §9(h) and achieve them more effectively.²

or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

²See H.R.Rep. No. 741 on H.R. 8342, 86th Cong., 1st Sess., 33-35, 79 (supplementary views), I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 791, 837. The original bill as it passed the Senate on April 25, 1959, contained no criminal disability provision relating to Communists. See S. 1555, 86th Cong., 1st Sess., §305(a) (1959), and S.Rep. No. 187 on S. 1555 at 12-13. The Senate recognized the defects of the affidavit procedure then in use, but sought to make detailed changes with respect to the time for filing, the role of the N.L.R.B. in administering the procedure, etc., while preserving the affidavit framework for control of Communists in the labor unions. S.Rep. No. 187, *supra*, 36-37, I Legislative History, *supra*, 430-432. It was the House bill, H.R. 8342, passed in July of 1959, which first contained a prohibition against Communists holding office in labor unions together with a repeal of 9(h). See §§201(3) and 504(a) of H.R. 8342, *supra*. In conference the House amendment to the Senate bill S. 1555 was agreed to with various substitutions, including an added criminal sanction against any labor organization or official thereof knowingly permitting any person to violate §504. See Conf.Rep. 1147 on S. 1555, 86th Cong., 1st Sess., 36 (1959), I Legislative History, *supra*, 440.

The purpose of the former section and the evils Congress intended it to combat were fully explored by the Supreme Court in *American Communications Assn. v. Douds* (1950) 339 U.S. 382. There the court stated, at pages 388-389:

"One such obstruction, which it was the purpose of § 9 (h) of the Act to remove, was the so-called 'political strike.' Substantial amounts of evidence were presented to various committees of Congress, including the committees immediately concerned with labor legislation, that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government. . . .

It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives, including the advocacy of change by democratic methods, but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action."

Section 504, then, was enacted in a continuing effort by Congress, in its regulation of interstate commerce, effectively to prevent the interruption of a free flow of commerce by political strikes.

Appellant has been a member of the Communist Party since at least 1935. In elections for the years 1959, 1960 and 1961, he was, while a party member, elected a member of the Executive Board of Local 10 (San Francisco, California), of the International Longshoremen's and Warehousemen's Union. Thereafter, while a party member, he served in this official capacity. He was thereupon indicted for a violation of § 504. He was tried and convicted and this appeal is taken from judgment of conviction.

Before we reach the constitutional problems which the appeal presents, it is necessary to deal with a matter of statutory construction. Appellant contends that the executive board of the local to which he was elected is not a "governing body"; that it is not the sort of "executive board" to which the statute applies.

The court instructed the jury that the Union's executive board was an executive board within the meaning of the statute. Appellant assigns as error the action of the district court in taking this question from the jury and in refusing to instruct the jury that it had to find that the board had power to impose its policies upon the Union and thus to engage the Union in activities which might disrupt the flow of commerce.

Two questions are presented by these contentions. First, was a jury question presented as to whether or not the executive board of the Union was an "executive board or similar governing body" within the meaning of the statute? Second, if not—if this question was a question of law—was it correctly answered by the court? Upon both issues we agree with the district court.

As to the nature of the Union's board we find no factual dispute to be resolved. The constitution of Local 10, setting forth the nature and powers of the executive board, was put in evidence and was read to the jury by appellant's counsel.³ Appellant introduced testimony to show that the executive board was primarily a recommending body whose resolutions were subject to review (and rejection) by the total membership before being translated into action.

We may accept as true all factual contentions asserted by appellant to have been established by this proof; specifically, that the board was without power on its own authority to bring about the evil with which Congress was concerned.

The true issue presented by the contentions of appellant was not as to the authority actually possessed by the Union board,

³The Constitution described the executive board as "the advisory board of the Local," and provided that its powers and functions were: "to adopt such measures as are deemed necessary from time to time for the good and welfare of the local, subject to the approval of the membership; * * * attend to all matters referred to it by the local, also suggest remedies for immediate and permanent benefit and report to the regular meeting; * * * dispose of communications not of interest to the local and cooperate in every way so that the business to be covered at a regular meeting may be accomplished; * * * In cases of emergency * * * to act to protect the interests and welfare of the local; * * * study the labor movement closely and formulate concrete policies to strengthen our local—said policies to be in accord with the I.L.W.U."

but whether a board having the nature and powers specified by the local's constitution for this board, even though limited in its powers as factually contended by appellant, was an "executive board or similar governing body" within the meaning of the statute. This was a question of law.

Upon that question we note first that under the local's constitution the "executive board" was an integral part of the frame of government set up by that document for the local.

In our judgment appellant reads §504 too narrowly in attempting to confine "executive board" or "governing body" to one which, on its own authority, could take or require action threatening an interruption of commerce. While the statute was designed to strike at such interruptions its concern was not limited to those of executive authority who might by executive order accomplish such interruption. It included as well those who might by their position or office have power to influence such a result.

We note further that by specifying "any executive board" as well as "director" Congress apparently intended to include boards with a scope of authority different from that ordinarily possessed by a corporation's board of directors. By including within the prohibition all employees save those performing exclusively clerical or custodial duties, it has clearly manifested its desire to bring within the purview of §504 persons other than those who ultimately control the unions.

We also note that this Act and this section apply to persons convicted of certain crimes as well as to Communist Party members. Congress' wish to rid labor unions of racketeering and corruption by driving out criminal elements cannot reasonably be said to be restricted to upper-echelon positions of real power.

We conclude that the district court did not err in instructing the jury as it did.

This brings us to a consideration of the constitutional issue: whether criminal punishment of any and all Communist Party members who become union officers, regardless of lack of intent to bring about the evil the statute was designed to prevent or to further other unlawful aims of the Party, infringes the guarantees of the First and Fifth Amendments.

The district court, in denying motions to dismiss the indictment and for acquittal, held that no proof of specific intent of any kind was necessary under the statute and that so construed the statute was constitutional.⁴

We turn first to a consideration of the question whether, as so construed, this regulation constitutes an impermissible restraint upon appellant's First Amendment "freedom of association for the purpose of advancing ideas and airing grievances." *Bates v. Little Rock* (1960) 361 U.S. 516, 523. In support of the district court judgment the Government relies upon *American Communications Assn. v. Douds*, *supra*. There it was stated, at page 390:

"There can be no doubt that Congress may, under its constitutional power to regulate commerce among the several States, attempt to prevent political strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce."

It held that Congress could attempt to prevent Communists from serving as union officers by legislation providing that the important benefits of the National Labor Relations Act, including access to N.L.R.B. facilities, should be denied to unions having any Communist officers.

The Government urges that from this it follows that Congress, in order to make more effective its remedy for the conditions it could thus reasonably have found, could also impose personal criminal sanctions on this same general basis of political affiliation, by providing that mere membership in the Communist Party, when combined with union officership, is conclusive of guilt. We cannot agree.

At least grave doubt is cast upon such a contention by the more recent Supreme Court decisions in *Scales v. United States* (1961) 367 U.S. 203, and *Noto v. United States* (1961) 367 U.S. 290. The thrust of these decisions was that a criminal conviction for becoming a member of an organization advocating overthrow of the government—in these cases the Communist Party—can escape First Amendment condemnation only if in each case it is

⁴The district court rejected appellant's offer of evidence that he had no intent to bring about any substantive evil, and it refused to give requested instructions requiring a finding of such intent.

proved (1) that the organization was engaged in the type of advocacy, of action to accomplish overthrow, that is unprotected by the First Amendment, and (2) that the defendant was an "active" member of such an organization with a specific intent to further such unlawful purposes. The court's rejection of membership per se as a constitutionally sufficient ground of conviction was based upon the recognition, also voiced in *Doubs*, 339 U.S. at 393,⁵ that the Communist Party has both legal and illegal aims and carries on both legitimate and illegitimate activities, and the further recognition that there may be members "for whom the organization is a vehicle for the advancement of legitimate aims and policies" alone. "If there were a * * * blanket prohibition of association with a group having both legal and illegal aims," the court reasoned, "there would indeed be a real danger that legitimate political expression or association would be impaired," *Scales v. U.S.*, *supra*, 367 U.S. at 229, for "one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. U.S.*, *supra*, 367 U.S. at 299-300.

*In *Doubs* the court, at page 400, states the problem posed by that case as follows:

"In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that political strikes are evils of conduct which cause substantial harm to interstate commerce and that Communists and others identified by § 9 (h) pose continuing threats to that public interest when in positions of union leadership. We must, therefore, undertake the 'delicate and difficult task . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.' *Schneider v. State*, 308 U.S. 147, 161 (1939)."

⁵339 U.S. at 393: "Communists, we may assume, carry on legitimate political activities."

In discussing the extent to which the holding in *Douds* bears upon the present case it is essential that the dimensions of the restraint (both in that case and in ours) be examined.

In one respect the dimensions coincide: how far into the rights involved the restraint cuts.

The court in *Douds*, at page 402, notes:

"The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief."

The restraint involved simply a loss of the right to hold union office—what the court refers to as "loss of position."

However, the court makes clear that lack of direct restraint upon Communist Party membership does not eliminate the First Amendment problem. At page 402 the court states:

"But as we have noted, the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature."

That loss of position by virtue of Communist Party membership is not to be confused with the usual conflict-of-interest situation is pointed out by the court at pages 392-393:

"If no more were involved than possible loss of position, the foregoing would dispose of the case. But the more difficult problem here arises because, in drawing lines on the basis of beliefs and political affiliations, though it may be granted that the proscriptions of the statute bear a reasonable relation to the apprehended evil, Congress has undeniably discouraged the lawful exercise of political freedoms as well. . . . By exerting pressures on unions to deny office to Communists and others identified therein, § 9 (h) undoubtedly lessens the threat to interstate commerce, but it has the further necessary

effect of discouraging the exercise of political rights protected by the First Amendment. Men who hold union offices have little choice but to renounce Communism or give up their offices. Unions which wish to do so are discouraged from electing Communists to office. To the grave and difficult problem thus presented we must now turn our attention."

In a second dimension—the quality of the restraint—the restraint confronting us is larger than that in *Doubs*. There the court notes, at page 399:

"The unions contend that the necessary effect of § 9 (h) is to make it impossible for persons who cannot sign the oath to be officers of labor unions."

This the court denies, stating at page 390:

"The statute does not, however, specifically forbid persons who do not sign the affidavit from holding positions of union leadership nor require their discharge from office. . . . We are, therefore, neither free to treat § 9 (h) as if it merely withdraws a privilege gratuitously granted by the Government, nor able to consider it a licensing statute prohibiting those persons who do not sign the affidavit from holding union office. The practicalities of the situation place the proscriptions of §.9 (h) somewhere between those two extremes."

The quality of the restraint in *Doubs* was an indirect "discouragement" obtained through pressure applied to the union. In the language of the court, at page 412, it was "to encourage unions to displace them [Communist Party members] from positions of great power"

In our case the restraint is imposed directly upon the individual. It is not discouragement. It is one of the "extremes": flat prohibition.

In our judgment, yet a third dimension of the restraint must also be considered: the force with which it is applied. The court in *Doubs*, at page 409, states:

"To hold that such an oath is permissible, on the other hand, is to admit that the circumstances under which one is

asked to state his belief and the consequences which flow from his refusal to do so or his disclosure of a particular belief make a difference. The reason for the difference has been pointed out at some length above. First, the loss of a particular position is not the loss of life or liberty. We have noted that the distinction is one of degree, and it is for this reason that the effect of the statute in proscribing beliefs—like its effect in restraining speech or freedom of association—must be carefully weighed by the courts in determining whether the balance struck by Congress comports with the dictates of the Constitution."

Since it is the effect of a statute in restraining freedom of association with which we are concerned, we can hardly refuse to consider the consequences which are made to flow from a determined assertion of the rights in question in face of the regulation. In *Doubs* the sanction was not a personal one; it was applied to the union, withdrawing from the union its rights to the benefits of the National Labor Relations Act. In our case, the sanction is not only personal, it is criminal. The imposing of a criminal sanction bears on the substantive quality of the restraint and poses new and different problems as to the reasonableness of the regulation. We are squarely faced with the principles enumerated in *Scales* and *Noto*.

This case, then, is far different from *Doubs*. The restraint here bears directly upon the person of the one asserting First Amendment rights, and it does so with the duress of criminal sanctions.

It is with personal and forceful character of the restraint in mind that we approach the question faced in *Doubs* and which faces us here—whether, in the absence of specific intent to accomplish that which Congress seeks to prevent, there is sufficiently close relationship between the regulation and the achievement of the Congressional objective.

In *Doubs* the court, at page 406, states:

"It is contended that the principle that statutes touching First Amendment freedoms must be narrowly drawn dictates that a statute aimed at political strikes should make the calling of such strikes unlawful but should not attempt to

bring about the removal of union officers, with its attendant effect upon First Amendment rights."

This contention the court rejected, stating that "Congress should not be powerless to remove the threat, not limited to punishing the act." The court then concludes:

"While this statement may be subject to some qualification, it indicates the wide scope of congressional power to keep from the channels of commerce that which would hinder and obstruct such commerce."

In our judgment the regulation here—far broader than the threat it is designed to meet—is unreasonably broad. To relieve Congress from having to wait until it can punish the act, it is given power not simply to remove the threat but to punish it; and with no showing whatsoever that the act in fact is threatened by the person punished.

We conclude that this statute as construed by the district court constitutes an invalid restraint upon the freedom of association protected by the First Amendment.

Since §504 involves criminal punishment, we are also faced with serious problems of due process under the Fifth Amendment, which were not before the Supreme Court in *Douglas*. The question raised by §504 is similar to that stated as follows in *Scales v. U. S.*, *supra*, 367 U.S. at 220: whether the section "impermissibly imputes guilt to an individual merely on the bases of his associations and sympathies, rather than because of some concrete personal involvement in criminal conduct."

Upon this question the court in *Scales* stated at pages 224-225:

"In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow), that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment."

And further, page 226:

"... the enquiry here must direct itself to an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct, in order to determine whether that relationship is indeed too tenuous to permit its use as the basis of criminal liability."

And further, page 227:

"It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that 'act' alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing."

In our judgment these constitutional standards of criminal imputability from association to individual are not met unless §504 could be read as restricted to party members harboring specific intent to use union office to interrupt interstate commerce or actively and purposefully participating in furtherance of illegal party activities aimed at overthrow of the Government.

It is true that in *Scales* and *Noto* the court was faced with a statute which attributed to an individual member of an organization, seemingly on the basis of membership alone, criminal conduct in which the organization was found to be engaged.

Here, it is argued, criminality is not based solely on attribution from association; there is an individually and knowingly performed act—that of becoming a union officer—for which punishment is imposed.

We feel that this is not a valid point of distinction. In *Scales* the defendant might have been said to have knowingly and individually violated the law through his act of association. (He was indicted for being a member of the party with knowledge of its illegal purpose.) But this was not the gist of the crime—of that which society had found offensive. The gist of the offense was the advocacy in which the organization was engaged.

So here, the gist of the offense (and, indeed, the sole basis for federal concern) lies in the anticipated efforts of the individual to use union authority or influence to bring about union action which would interfere with commerce. This, to quote from *Scales*, *supra*, is "the underlying substantive illegal conduct." It is the relationship of Communist union officers to this potential disruptive and illegal activity which alone can justify the punishment imposed by §504. In our judgment that relationship is not sufficiently substantial to justify, under the due process clause, imposition of criminal punishment on the basis of union officership combined with Communist Party membership *per se*.

We conclude that the relationship between the conduct or status punished and the evil intended here to be prevented is not sufficiently close or substantial to meet the requirements of either the First or Fifth Amendments unless §504 can be construed as requiring proof either that the defendant has specific intent to use his union office to attempt to disrupt interstate commerce or that he is an active member of the Communist Party with specific intent to promote unlawful party advocacy and action directed toward overthrow of the Government.

We feel it clear that this statute is not susceptible of such a limiting judicial construction.

It is true that in *Dennis v. U. S.* (1951) 341 U.S. 494, *Yates v. U. S.* (1957) 354 U.S. 298, and *Scales v. U. S.*, *supra*, criminal statutes, as applied to Communist activity or membership, were construed narrowly to include requirements of intent and unlawfulness of advocacy that were sufficient to remove doubts as to the constitutionality. But in each case ambiguous statutory language made such construction available.⁶

⁶Thus *Dennis* held that proof of intent to overthrow the Government by force was an essential element of both §2(a)(1) of the Smith Act (making it unlawful "to knowingly or willfully advocate * * * or teach" forceful overthrow of the Government), and §2(a)(3) of the Act (making it unlawful "to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage" such overthrow). The opinion of Chief Justice Vinson, for four members of the court, declared that implicit in the very nature of advocacy of and organization

Here we are not faced with ambiguous statutory expression but with a lack of expression. The segregation of guilty from what we have held must be innocent holding of union office is not at all suggested by the statutory language. It is wholly inappropriate to consider whether scienter should be deemed essential, for the very nature of the scienter that is constitutionally necessary is hidden. No Communist Party member could know, from a reading of the statute, whether, of the many party purposes, those which he personally embraces do or do not disqualify him from union office or employment.

Not only then, is the statute overbroad. It is so wholly lacking in notice of the constitutionally essential components of the crime that it cannot be judicially narrowed.

We conclude that §504 of the Labor Management and Reporting Act, in its imposition of criminal sanctions upon Communist Party members, must be held to conflict with the First and Fifth Amendments of the United States Constitution, and upon this ground to be void.

Reversed and remanded with instructions that judgment be set aside and the indictment dismissed.

for advocacy of overthrow is an intent to bring about that overthrow. 341 U.S. at 499. *Scales* involved conviction under the Smith Act clause making it unlawful to become or be a member of any such society advocating or teaching overthrow of the Government, "knowing the purposes thereof." The court declared that the reasoning in *Dennis* "applies equally to the membership clause," and held that the clause requires proof of specific intent to further illegal and constitutionally unprotected party activities directed toward forcible overthrow of the Government. In *Yates, Scales* and *Noto v. U. S.*, *supra*, the court, by construing the word "advocate," held that the activity which is punishable by the first clause of the section and in which the organization must engage to warrant punishment of its members under the membership clause, is "advocacy 'not of . . . mere abstract doctrine of forcible overthrow, but of action to that end, by the use of language reasonably and ordinarily calculated to incite persons to . . . action' immediately or in the future." *Noto v. U. S.*, *supra*; 367 U.S. at 297, quoting from *Yates v. U. S.*, *supra*, 354 U.S. at 316.

DUNIWAY, Circuit Judge (Concurring):

I concur in the opinion of my brother Merrill. However, because I do not think that his opinion sufficiently answers the arguments advanced by my brother Hamley, I feel obligated to state my views as to those arguments.

I think that the question raised by my brother Hamley is not quite the question that this case presents. In my opinion, if a particular executive board, under the constitution or bylaws or other governing instruments of the union, has powers that bring it within the meaning of 29 U.S.C. §504 ("executive board or similar governing body"), then it makes no difference that, in practice, the executive board does not exercise some of those powers. It would still have the right to exercise them. I think that Congress was aiming at membership in a board having such a right. Therefore, the court could properly look to the union constitution, which was the only governing instrument in evidence. I also think that, assuming that the copy of the constitution in evidence is in fact the constitution, and that it is a correct copy, the question as to whether the executive board is one falling within the statute is a pure question of law. It is not transmogrified into a question of fact because the defendant contends that the board does not fall within the statute. If, in a particular case, the government sought to show that a board in fact had and exercised *more* power than the constitution gave it, the question might be different, but it is not before us.

I cannot tell from Judge Hamley's opinion whether he bases his statement that the question is one of fact upon a construction of the union constitution or upon the evidence offered by the union to show that, in practice, the board did not exercise the full powers that the constitution conferred upon it. If his statement refers to a construction of the constitution, then I think that he is plainly wrong. The meaning and effect of such a document has always been considered a question of law. If his statement refers to the union's evidence as to practice, where, as here, the practice is introduced to show that the board exercises less power than it has, my answer is that, as a matter of law, such practice is immaterial; it would have been improper for the jury to base its decision on that evidence, and the trial judge should have excluded it. Its admission is not an error of which

Brown can complain, nor, *a fortiori*, is it an error to fail to tell the jury that it should consider that evidence in deciding whether the executive board was such a board as is referred to in the statute. To tell the jury that would have been error.

Here, as Judge Merrill points out, there was no controversy as to the authenticity or accuracy of the copy of the union's constitution that was in evidence. These facts were "admitted" just as fully and effectively as if there had been a formal stipulation about them. So, in my view, the only question left, on this phase of the case, was one of law.

If I am in error in the foregoing analysis, however, I think that the result would be the same. I agree with Judge Merrill that, even if we accept as true all of the factual contentions of appellant as to this issue, the question is still one of law.

The dispensing power of the jury—its power to decide a criminal case for the defendant, against both the law as stated by the judge and the facts as shown by the evidence, is long established. I think that it lies at the heart of the problem that is here presented. But it does not, in my opinion, require a reversal here.

My view is supported by high authority. In *Horning v. District of Columbia*, 1920, 254 U.S. 135, defendant was charged with violation of a District of Columbia law forbidding pawnbroking at interest in excess of 6%. Defendant admitted that he was pawnbroking, but denied that he was doing so within the District. He testified that he warehoused pledges in the District, but granted loans and signed contracts only in Virginia. He maintained an automobile service to transport customers across the bridge to his office. The court charged that, on that state of facts, he was a pawnbroker in the District. Defendant claimed that the court thus effectively decided against his only defense. Mr. Justice Holmes affirmed:

"This is not a case of the judge's expressing an opinion upon the evidence, as he would have had a right to do The facts were not in dispute, and what he did was to say so and lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict if it is true, and the jury has the power to bring in a verdict

in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found Perhaps there was a regrettable peremptoriness of tone—but the jury were allowed the technical right, if it can be called so, to decide against the law and the facts—and that is all there was left for them after the defendant and his witnesses took the stand.” (pp. 138-39)

This court has come to a similar conclusion in *Peterson v. United States*, 9 Cir., 1925, 4 F.2d 702. Defendant, charged with illegally possessing and selling whiskey, admitted possessing the liquor under circumstances that he claimed were not illegal. The charge advised the jury that defendant's testimony admitted illegal possession. Affirmed: “In declaring that the possession was unlawful, the court did no more than to state the law applicable to the admitted facts.” (p. 702)

Nordgren v. United States, 9 Cir., 1950, which is discussed by Judge Hamley, also seems to me to be squarely in point. There is no claim that, in the present case, the court did not do what trial judges invariably do, and what the trial judge did in *Nordgren*, namely, tell the jury that it was their sole province to determine the facts. The judge did so instruct the jury, not once, but three times. This case does differ from *Nordgren* in one respect, namely, that here the court was asked to tell the jury that the question of whether the executive board was such a board as the statute refers to was a question of fact for them to decide. The court's reference to the lack of such a request, in *Nordgren*, is at most, only an alternative ground of decision, and, more realistically, a sort of bolstering afterthought.

See also the decision of Judge Gilbert in *May v. United States*, 9 Cir., 1907, 157 Fed. 1, 5-6. I can find no persuasive basis on which to distinguish these cases from the one before us.

In attempting to hew a path between “law” and “fact” it is difficult if not impossible not to lapse into semantics. I suppose no one would argue that it is not the judge's province to interpret a statute for the jury—this is a “question of law,” and one on which he is the expert. I do not think that, in doing so, he is required to limit himself to bland abstractions, although that is

what most judges usually do. If a judge is to give effective guidance to the jury, he ought to be as specific in his instructions as the facts of the case allow him to be. I do not see why, in interpreting a statute, he may not state that an admitted board falls within the statute's reference to a board. Defendant's argument is, after all, one of legal analysis, and the judge is better able than the jury to evaluate it. And yet, when the judge personalizes his statutory interpretation to apply to defendant's situation when the question to be decided is a necessary increment in the determination of defendant's guilt, Judge Hamley would call it a question of fact. Impliedly he would sacrifice expertise to protect the jury's discretion to decide irrationally.

I do not think that it aids analysis to argue, as does Judge Hamley, that it is error to direct a verdict in a criminal case (which it is) and that therefore an instruction which "takes a fact question away from the jury" is a partial direction and also error. This assumes too much. The vice in directing the verdict is that the jury is deprived of any opportunity to decide the case. Even though the judge does, in a sense, decide some issues through peremptory instructions of "law", the jury still gets the whole case for a final determination of guilt or innocence. When the jury entertains that final question in the privacy of the jury room its freedom is unrestricted. This is the dispensing power, and all must concede that if the decision is for defendant it is unreviewable and uncorrectable. In practice, it is no doubt less likely that the jury will exercise an independent choice on an issue presented to them as a matter of "law." But this only gets us back to the original problem: How far may the judge go in inducing responsible exercise of the dispensing power without unduly infringing on that power?

Perhaps this question can be narrowed still further. Judge Hamley distinguishes, and seems to approve, cases which involve, not peremptory jury instructions, but only "permissible comment" by the trial judge. But I suggest that the fact that a federal judge is given some latitude of permissible comment is a commitment against the irrational verdict and a not inconsiderable impingement on the jury's discretion. Conceding that a jury might feel less compulsion to follow a judge's considered opinion than his peremptory instruction "as a matter of law," I doubt

whether the difference in effect often is or ought to be substantial. Mr. Justice Holmes addressed himself to this point in *Horning v. District of Columbia*, *supra*, and clearly was not troubled by it. Nor was this court in *Peterson v. United States*, *supra*.

I do not see that the method adopted by the trial judge here, which finds support in decisions of this circuit and the only Supreme Court case that seems in point, constitutes any significant abridgement of the defendant's right to trial by jury. Moreover, I respectfully suggest that the cases upon which Judge Hamley relies do not as strongly support the result that he would reach as his opinion indicates that they do.

Most clearly distinguishable is *Sullivan v. United States*, D.C. Cir., 1949, 178 F.2d 723. Defendant was charged with "forging and uttering a physician's prescription for a narcotic drug" for the purpose of defrauding the United States. He admitted that he forged the prescription and presented it at a drugstore, but denied his intent to obtain a drug. The charge nevertheless told the jury that he had admitted "forging and uttering" within the statutory definition. This was reversed on appeal, because the admitted conduct was not within the statute unless there was intent to obtain narcotics, and that intent was denied. Clearly this case is one in which the court either erroneously stated the law, or, as the court seems to have treated it, assumed a fact on which defendant had testified to the contrary.

United States v. Manuszak, 3 Cir., 1956, 234 F.2d 421, is distinguishable on a different ground. The question there was defendant's guilt on a charge of interstate shipment of stolen goods. The government introduced witnesses to prove the theft, interstate movement, and defendant's involvement. The defense was that the accused was not the man, and knew nothing about the events. The court charged that there was no question that a theft had taken place and the only question was whether defendant had been properly identified as a participant. This was held reversible error because the theft was a necessary element, and its existence was for the jury. But it is clear that the appellate court was concerned that all evidence proving the theft was put on by the government. Overwhelming as it was, and uncontested, there was still the question of credibility, and this is always for the trier of

fact. Where as in the present case defendant affirmatively accepts and relies on the evidence which establishes an issue in the case, the credibility aspect is absent. Note also that in *Matuszak*, the question decided by the court was one of "physical fact" not legal significance. The question was: "Did certain acts take place"; not "did these admitted acts amount in law to theft"? The former question is not one which the judge has any special competence to answer by virtue of his legal training and experience; the latter is.

The same analysis, the significance of credibility, may explain *United States v. McKensie*, 6 Cir., 1962, 301 F.2d 880, and *Roe v. United States*, 5 Cir., 1961, 287 F.2d 435. *McKensie* presents the same problem as *Manuszak*; defendant charged with possession of illicit whiskey; government witnesses testify as to the crime, and identify defendant as a participant; defendant denies his presence and any knowledge of the alleged acts. One must believe the government witnesses to believe anything took place at all, as well as that defendant was a party. In *Roe*, the charge was sale of securities without registration. The items sold were mineral leases, which defendants claimed were not "investment contracts," and hence not "securities" within the 1933 Act. The Court of Appeals first analyzed the evidence (without indicating which side had produced it) and held, "as a matter of law, the evidence of these transactions, *if credited*, would constitute" the sale of a security. (Emphasis mine) If, as seems likely, the summarized evidence was government evidence, the same credibility problem is present. It must be conceded, however, that the language in both of these cases suggests that the court would have reached the same result if credibility had not been in issue.

Brooks v. United States, 5 Cir., 1957, 240 F.2d 905, is also explainable on the credibility point. The question assumed in the charge was the authority of an official, before whom defendant was alleged to have sworn falsely, to administer oaths. The official testified as to his authority and introduced his commission into evidence. The charge was that as a matter of law he was authorized. This was held to be error because it deprived the jury of the right to test the credibility of the witnesses, and to determine whether they believed the government's evidence beyond a reasonable doubt.

A careful reading of *Carothers v. United States*, 5 Cir., 1947, 161 F.2d 718, suggests that this case undercuts, rather than supports, Judge Hamley's position. Defendants were charged with violations of OPA maximum price regulations. The trial court's charge assumed the charging of prices above the applicable maximums. As to one defendant, the court reversed, saying that the court below had directed a verdict as to a material fact. But it added that "the evidence as to the March 1942 maximum was quite meagre and unsatisfactory." On the other hand, it sustained the jury charge as to two other defendants because "the defendant's schedules and the administrator's order had fixed as a matter of law the selling price." (*Id.* at 722).

This leaves only *United States v. Raub*, 7 Cir., 1949, 177 F.2d 312. In this case both the charge below and the reversing opinion above are so cloudy as to leave me uncertain as to what principle was applied. Defendant was charged with willful evasion of taxes by the filing of a fraudulent return. His defense was an attempted justification of his return as accurate within the revenue statutes, coupled with a denial of fraudulent intent based on his acting on the advice of his attorney. The oral charge, as reproduced in the opinion, was in effect "No doubt he did what he was charged with, you must decide if it was with purpose or intent to evade taxes." The Court of Appeals held that this prejudged the essential issue of "fraud" and was reversible error. If by this the court meant that the judge might not instruct the jury that the return was false under the law, then this ruling is perhaps contra to the trial court's charge in the present case. But the opinion's ambiguous use of the word "fraud", which to me implies intentional wrongdoing, may suggest that the court was primarily concerned with weighting the question of willfulness against defendant. At best, *Raub* is not a careful or persuasive analysis of the problem.

In short, I think that the trial court's instruction was correct. It was short, sensible, direct, and fully supported by the conceded fact—the union constitution. It had the great virtue of not dealing in vague abstractions. The jury still had the dispensing power, which, as Justice Holmes pointed out, is a "power to bring in a verdict in the teeth of both law and facts." The charge in no way deprived it of that power.

HAMLEY, Circuit Judge (Dissenting):

Without reaching the constitutional question I would reverse and remand for a new trial. I would do so on the ground that the trial court erroneously and prejudicially decided a question of fact which should have been left to the jury, namely, whether the executive board of Local 10, I.L.W.U. is an "executive board" of a labor organization within the meaning of section 504 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 536, 29 U.S.C. § 504. This question of fact was decided by the court adversely to appellant when the court instructed the jury:

"I instruct you that as a matter of law, the Executive Board of Local 10, ILWU, is an executive board of a labor organization within the purview of the statute."

The trial court should have instructed the jury as to the meaning of the term "executive board," as used in section 504, leaving it to the jury to determine whether the executive board of Local 10 is an executive board in this statutory sense.

In my view, a union executive board within the meaning of section 504 is any internal body of a union which, under the constitution and by-laws of the union as understood and given effect by the members, has the power substantially to influence or affect action by the union threatening an interruption of commerce. Such a definition gives recognition to the underlying purpose of the legislation which, as pointed out by the majority, is "effectively to prevent the interruption of a free flow of commerce by political strikes."

As I read the evidence and consider the reasonable inferences therefrom, I believe it cannot be said that the evidence shows beyond dispute that the executive board of Local 10 had such power. But even if I am mistaken as to this, it is at the very least clear that appellant did not admit that the executive board of Local 10 had this power. This being true, it was improper for the trial court to decide the question as one of law.

Stating my view in the form of a general proposition, it is this: A trial court may not take from the jury in a criminal case and decide adversely to the defendant, an essential question

of fact put in issue by a plea of not guilty and not thereafter admitted, even where the prosecution's view of the fact is supported by overwhelming and undisputed evidence.

There is one decision by this court which may be thought to state a view contrary to that expressed above. This is *Nordgren v. United States*, 9 Cir., 181 F.2d 718, involving a prosecution for offering and giving a bribe to a person acting for and on behalf of the United States in an official capacity. It was essential to conviction in that case that the person to whom the bribe was offered and given be a person acting for and on behalf of the United States in an official capacity. There was no dispute in the evidence as to this though the defendant did not concede the fact. The trial court instructed that the person was acting in an official capacity. Affirming, this court said (page 721):

"We think the charge was not error. There was, as already indicated, no controversy as to the facts pertaining to the functions MacKenzie was performing, and the charge did not misdescribe his duties. Moreover, appellant did not ask for an instruction submitting to the jury the question whether MacKenzie was performing an official function. The court in the course of its charge repeatedly informed the jury that it was their sole province to determine the facts."

The statement in this quotation that appellant failed to ask for an instruction submitting the question to the jury, suggests that if such an instruction had been requested it would have been held to be error for the court to take the question from the jury. In the case now before us appellant not only took appropriate exception to the instruction given, but specifically requested that the jury be told that this was a question of fact.

The statement in the quotation from *Nordgren* to the effect that the court repeatedly informed the jury that it was their sole province to determine the facts, suggests that this court may have regarded the questioned instruction as in the nature of a permissible comment on the evidence rather than as a binding determination of fact. If so, *Nordgren* cannot be regarded as authority for the proposition that a trial judge may take questions of fact from a jury in a criminal case where the evidence is undisputed:

Nevertheless, *Nordgren* has been construed by some courts as stating such a proposition. See *United States v. Lovely*, 4 Cir., 319 F.2d 673, 682, note 11; *Schwachter v. United States*, 6 Cir., 237 F.2d 640, 644.

Among the other circuits, only the Second appears to sanction the determination of questions of fact by the trial court in a criminal case, where the evidence is undisputed. Such a determination was given approval in *United States v. Mura*, 2 Cir., 191 F.2d 886. This was a prosecution for transporting stolen cars in interstate commerce. The trial court instructed the jury: "The automobiles that the Government believes have been identified all crossed the border between New York and New Jersey. . . ." In sustaining this instruction the court stated that the evidence was conclusive, that the jury was not instructed that defendant transported the cars, and that the question of the defendant's guilt was left to the jury "under a perfectly impartial charge."¹

In the Third, Fifth, Sixth, Seventh and District of Columbia Circuits, involving all of the more recent decisions on the question, such an instruction has been held to constitute reversible

¹There is another Second Circuit case, *United States v. Rainone*, 2 Cir., 192 F.2d 860 which might appear to represent a similar holding. There was, however, no formal instruction, but only a remark by the trial judge to the effect that "there was not any question as to whether the automobile was taken from Brooklyn to Stamford." The court of appeals seems to have regarded this as permissible comment, stating that the record revealed nothing indicating that the defendant was adversely affected by the remark.

As pointed out above, our decision in *Nordgren v. United States*, may also fall in this category. *Dusky v. United States*, 8 Cir., 271 F.2d 385, rev'd on other grounds, 362 U.S. 402, also appears to involve comment on the evidence rather than a categorical instruction resolving an issue of fact.

A contention that a court instruction took a question of fact from the jury will not be entertained in a collateral proceeding under 28 U.S.C. § 2255, at least where the evidence indisputably supports the instruction. See *United States v. Lovely*, 4 Cir., 319 F.2d 673; *United States v. Jonikas*, 7 Cir., 197 F.2d 675. And of course the trial court may instruct that a particular fact is undisputed if it was a fact admitted by the defendant during the trial. *Horning v. District of Columbia*, 254 U.S. 135; *Young v. United States*, 9 Cir., 286 F.2d 13; *Peterson v. United States*, 9 Cir., 4 F.2d 702.

error. See *United States v. McKenzie*, 6 Cir., 301 F.2d 880;² *Roe v. United States*, 5 Cir., 287 F.2d 435; *Brooks v. United States*, 5 Cir., 240 F.2d 905; *United States v. Manuszak*, 3 Cir., 234 F.2d 421; *Sullivan v. United States*, D.C. Cir., 178 F.2d 723; *United States v. Raub*, 7 Cir., 177 F.2d 312; and *Carothers v. United States*, 5 Cir., 161 F.2d 718.³

Some discussion of a few of these cases will reveal the reasoning which has led a majority of the federal appellate courts to disapprove instructions deciding factual questions as if they were questions of law.

In *United States v. McKenzie*, the defendant was prosecuted for possessing distilled spirits, the immediate container thereof not having affixed thereto the required internal revenue stamps. The trial court, in effect, instructed the jury that the identification of appellant was the only issue left in the case. Reversing, the Sixth Circuit said (page 882):

"No matter how conclusive the evidence may be in a criminal case on a controverted material fact, the trial judge cannot make the finding or withdraw the issue from the jury."

In *Roe v. United States*, the defendant was prosecuted for the sale and delivery of securities through the use of the mails without prior registration. The trial court instructed the jury, on undisputed evidence that the documents which the defendant was charged with selling and delivering were investment contracts. Reversing, the Fifth Circuit said (page 440):

"... no fact, not even an undisputed fact, may be determined by the Judge. The plea of not guilty puts all in issue, even the most patent truths. In our federal system,

²This decision is to be compared with two earlier Sixth Circuit decisions in one of which (*Schwachter v. United States*, 6 Cir., 237 F.2d 640), such an instruction was also disapproved, and in the second of which (*Malone v. United States*, 6 Cir., 238 F.2d 851), such an instruction was upheld.

³I do not include in this list cases such as *Dixon v. United States*, 8 Cir., 295 F.2d 396, where the evidence was in dispute. All courts appear to recognize that factual questions in a criminal prosecution cannot be decided by the trial court where the evidence is in conflict.

the Trial Court may never instruct a verdict either in whole or in part."

In *Brooks v. United States*, the defendant was prosecuted for perjury. The trial court instructed the jury that a named special agent of the Internal Revenue Service was, at the time he was alleged to have administered an oath to defendant, authorized to administer oaths. Reversing, the Fifth Circuit said (page 906):

"... it [the instruction] deprived the jury of its function of determining whether or not, under the evidence and as exclusive judges of the facts and of the credibility of the witness, they believed beyond a reasonable doubt that Perry was an officer authorized to administer oaths in 1955 and this violated appellant's constitutional right to a trial by jury as guaranteed by the Sixth Amendment."

In *United States v. Manuszak*, the defendant was prosecuted for theft of goods from an interstate shipment. One of the facts essential to conviction was that a theft of goods had occurred. The evidence was undisputed that there had been such a theft and the trial court so instructed the jury. Reversing, the Third Circuit said (page 424):

"The presumption of innocence to which appellant was entitled demanded that all factual elements of the government's case be submitted to the jury. It is immaterial that the government's evidence as to the actual theft was uncontradicted. The acceptance of such evidence and the credibility of witnesses is for the jury, even though to the court the only possible reasonable result is the acceptance and belief of the government's evidence. A partial direction of the verdict occurs when the court determines an essential fact, and this denies the appellant trial by jury."

While the Supreme Court appears not to have dealt with the precise question, it has held that "... a judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 408. I agree with the Fifth Circuit's holding in *Roe v. United States*, and the Third Circuit's holding in *United States v. Manuszak*, that when a trial court, in a criminal case,

decides a factual issue as a matter of law, it is giving a partial direction of the verdict, and that this is forbidden under the rule prohibiting directed verdicts in criminal cases. If a verdict may not be directed on all issues, it may not be directed on any issue, for the issue upon which direction is given may be, to the jury, the dispositive issue in the case.

If *Nordgren v. United States*, 9 Cir., 181 F.2d 718 is deemed to announce a contrary rule, I believe it should be overruled.

CHAMBERS, Circuit Judge, dissenting:

I agree with Judge Merrill insofar as he holds that Brown's executive board was one within the meaning of 29 U.S.C. § 504 and that it was correct for the trial judge to tell the jury so. Therefore, I would disagree with Judge Hamley's dissent that such was a jury question.

But as of now I would hold the statute constitutional. A far different case we would have if the statute proscribed a Communist party member's right to be a member of a union or to get a job.

I cannot agree that *Douds*, 339 U.S. 382; *Bates v. Little Rock*, 361 U.S. 516; *Scales v. United States*, 367 U.S. 203; and *Noto v. United States*, 367 U.S. 290, necessarily indicate we should declare § 504 unconstitutional.

I shall not repeat Judge Merrill's excellent summary of the Congressional reasons for adopting § 504.

All through our United States Code we find restrictions on conflicts of interest with criminal penalties therefor, only because experience has shown "a disposition to commit" on the part of executives. See 18 U.S.C. § 281, § 283; 38 U.S.C. § 1764(a); 38 U.S.C. § 1664; 18 U.S.C. § 1909; 12 U.S.C. § 377; 15 U.S.C. § 19; 12 U.S.C. § 1812; 15 U.S.C. § 78(d); 49 U.S.C. § 1321; and 49 U.S.C. § 11. The fact that a high percentage would discharge their duties without favoritism is to no avail. "Disposition of the class of persons to commit" is enough for the proscription.

Schware v. Board of Bar Examiners, 353 U.S. 232, holds one cannot be barred from becoming a lawyer merely because one is

or has been a member of the Communist party. I would suppose though that an integrated state bar act might permissibly provide that one could not be an officer of that organization if he were a Communist.

One needs a basic right to a job. One doesn't need a right to be a union officer or to be an executive with a possible conflict of interest with his government.

BARNES, Circuit Judge, dissenting:

I concur with Judge Chambers, both in his agreement with Judge Merrill's opinion, and in his dissent therefrom, as well as his dissent with Judge Hamley on the jury question. I believe that the delicate "balance struck by Congress comports with the dictates of the Constitution." The "wide scope of congressional power to keep from the channels of commerce that which would hinder and obstruct such commerce" is not, to me, violative of § 504 here considered.

While a police officer or a congressional employee, under investigation, has a "right" to invoke the Fifth Amendment—he has no right to hold a particular job thereafter. Appellant herein had a right to be a certain kind of member in the Communist Party, but has no "right" to hold office in labor unions, which office directs the labor union's policy, once Congress has seen fit to refuse him such office holding. The congressional right to protect the full flow of interstate commerce must itself be protected; not at all odds, but when reasonably exercised, as I feel it here was. In this I disagree with the majority.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 18,005

ARCHIE BROWN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for
the *Northern* District of *California, Southern*
Division.

This cause came on to be heard on the transcript
of the Record from the United States District Court
for the *Northern* District of *California, Southern*
Division.

And was duly submitted.

On consideration whereof, It is now here ordered
and adjudged by this Court, that the judgment of
said District Court in this Cause be, and hereby is
reversed and remanded with instructions that judg-
ment be set aside and the indictment dismissed.

Filed and entered June 19, 1964.

(35)



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In the Supreme Court

**OF THE
United States**

OCTOBER TERM, 1964

No. 399

UNITED STATES OF AMERICA, *Petitioner,*

VS.

ARCHIE BROWN, *Respondent.*

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

QUESTION PRESENTED

The Government defines the question presented as follows:

“Whether 29 U.S.C. 504, which makes it unlawful for a member of the Communist Party to serve as an officer, director, trustee, or member of the executive board of a labor organization, is unconstitutional.”

So presented, we think the question is much too broadly stated. It is submitted that the Court of Appeals framed the question accurately, in these words:

"Whether criminal punishment of any and all Communist Party members who become union officers, regardless of lack of intent to bring about the evil the statute was designed to prevent or to further other unlawful aims of the Party, infringes the guarantees of the First and Fifth Amendments" (Petition, 11¹).

STATEMENT

The government does not affirmatively argue that the decision below was incorrect. It does not assert that a decisional conflict exists among the Circuits. And, while relying on this Court's decision in *American Communications Association v. Douds*, 339 U.S. 382, the government does not actually claim that the decision below is in conflict¹ with *Douds*.

What the government does urge, is that

(1) because the prohibitions of 29 USC 504 (quoted in the Petition at page 2) were part of "a major revision of the national labor laws enacted by Congress after long controversy and mature deliberation"; and hence "the statute has a general and continuing importance"; and

(2) because Section 504 was adopted by Congress to replace Section 9(h) of the Labor Management Relations Act of 1947, and this Court had previously upheld the constitutionality of Section 9(h),

¹The page references used herein are to the pagination of the Petition, not to that of the Court of Appeals' opinion.

therefore "review by this Court is plainly warranted" (Petition, 4-5).

We do not deny that the question is important. We submit, however, that it was correctly answered below. If this Court agrees to review the matter, it should affirm the decision below upon the grounds relied upon by the Court of Appeals.

ARGUMENT

The Court of Appeals held that Congress could not "impose personal criminal sanctions on . . . [the] . . . basis of political affiliation, by providing that mere membership in the Communist Party, when combined with union officership is conclusive of guilt." (Petition, 12.) It held that legislation which did that, violated rights guaranteed by the First and the Fifth Amendments to the Constitution.

The holding below was based upon this Court's decisions in *Scales v. United States*, 367 US 203, and *Noto v. United States*, 367 US 290. Their import was that membership in the Communist Party could not be made criminal under the First Amendment without proof, in the particular case, (1) that the Party was engaged in the advocacy of action, unprotected by the First Amendment, to accomplish violent overthrow of government; and (2) that the defendant had the personal specific intent to further such unlawful purposes. The government does not suggest that the Court below incorrectly read this Court's decisions in *Scales* and *Noto*; nor does it say that the First

Amendment requires anything less than what this Court, in those cases, said it requires.

It is, we submit, indisputable that both on its face and as applied here,² the statute resulted in a criminal conviction without proof of either of these—or other³—constitutionally essential elements.

The Court below quite correctly distinguished *American Communications Association v. Douds*, 339 US 382, a decision by a closely divided Court, from the instant case. In brief, *Douds* involved the withdrawal of a government privilege (access to facilities of the National Labor Relations Board) for the failure of a union officer to declare under oath his non-membership in the Communist Party. But here, there is imposition of “personal criminal sanctions” for mere Communist Party membership when combined with union officership. The difference in the quality of the restraint and the force with which it is to be applied (Petition, 14-15) demonstrates that “[t]his case then is far different from *Douds*” (Petition, 16). That being so, the divided decision in *Douds* does not control the disposition of this case, in which the statute makes criminal the assertion of First Amendment rights.

²The District Court rejected respondent's offer of evidence that he had no intent (or ability) to bring about any such substantive evil, and it refused to give respondent's requested instructions requiring a finding of such intent (or ability) before a guilty verdict could be returned. (Petition, 12, n. 4.)

³The District Court also rejected respondent's offer of evidence that neither the Union nor the executive board had any intent or ability to bring about any substantive evil (R.T. 466-467, 470), and it refused to give respondent's requested instructions requiring a finding of such intent or ability before a guilty verdict could be returned. (C.T. 26; R.T. 484, 607.)

Since the statute at bar is a criminal statute, the due process requirements of the Fifth Amendment, which were not present in *Douglas*, must likewise be considered here. The instant statutes impermissibly impute guilt to a defendant because of his membership in the Communist Party, rather than because of some concrete personal involvement in criminal conduct. (Petition, 17-18.) Clearly, as the Court below held, such a statute cannot withstand the condemnation of the Fifth Amendment's due process clause.

In addition, it is clear that no judicial construction can limit the statute to make it Constitutional. In the first place, the government did not seek below (nor does its present petition seek) to limit the statute in any way. In the second place, as the Court below pointed out (Petition, 19-20) the statutory language is not ambiguous. The statute is "overbroad" and is "so wholly lacking in notice of the constitutionally essential components of the crime" as to render it invalid on its face (as well as invalid as here applied). (See *Thornhill v. Alabama*, 310 US 88 and *Carlson v. California*, 310 US 106.)

Finally, although it did not cite them, the opinion below comports entirely with this Court's recently expressed views that, even in a non-criminal case,

"... [t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminal accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.

... These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, Government may regulate in the area only with narrow specificity."

National Association For The Advancement of Colored People v. Button, 371 US 415, 433.

How much more true is this in a criminal prosecution.

CONCLUSION

If the Court accepts the government's position that the question is important enough to call for an expression of this Court's views, we urge that upon issuing the writ this Court affirm the judgment upon the manifestly correct and constitutionally sound opinion of the Court of Appeals.

Dated, San Francisco, California,
September 8, 1964.

Respectfully submitted,

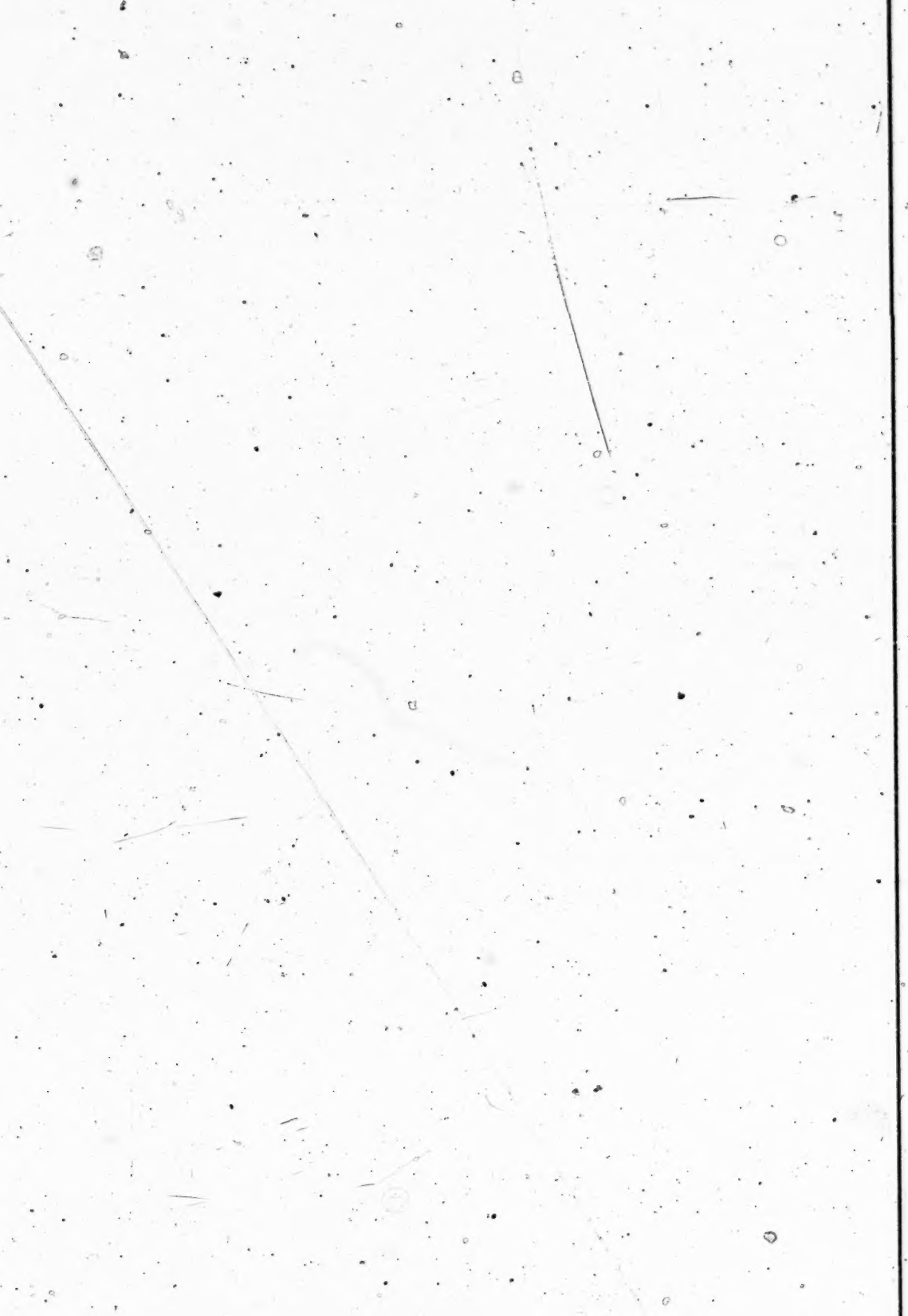
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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 399

UNITED STATES OF AMERICA, PETITIONER

v.

ARCHIE BROWN

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals are reported at 334 F. 2d 488.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1964 (R. 278). On July 17, 1964, Mr. Justice Goldberg extended the time for filing a petition for a writ of certiorari to and including August 18, 1964 (R. 278). The petition was filed on August 18, 1964, and was granted on November 9, 1964 (R. 279). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 29 U.S.C. 504, which makes it unlawful for a member of the Communist Party to serve as an officer, director, trustee, or member of the executive board of a labor organization, is constitutional.

STATUTES INVOLVED

Section 504 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 504, provides in pertinent part:

§ 504. *Prohibition against certain persons holding office; violations and penalties.*

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, * * *

* * *
during or for five years after the termination of his membership in the Communist Party, or

for five years after such conviction or after the end of such imprisonment * * *.

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

Section 9(h) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (formerly 29 U.S.C. 159(h)), which was repealed by Section 201(d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525, provided:

§ 9(h). *Affidavits showing union's officers free from Communist Party affiliation or belief.*

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sec-

tion 35A of the Criminal Code shall be applicable in respect to such affidavits.

STATEMENT

Respondent was charged in a one-count indictment returned in the Northern District of California on May 24, 1961, with violation of 29 U.S.C. 504, in that from October 1959 up to and including the date of the indictment he knowingly and willfully served as a member of the Executive Board of Local 10, International Longshoremen's and Warehousemen's Union ("ILWU"), while a member of the Communist Party (R. 1). After trial by jury, respondent was convicted and sentenced to six months' imprisonment. On appeal, the original three-judge panel, *sua sponte*, ordered the case set for reargument before the court *en banc*. The court, by a vote of 5 to 3, ordered the conviction set aside and the indictment dismissed. The court ruled that Section 504, insofar as it relates to members of the Communist Party, is unconstitutional under the First Amendment and under the due process clause of the Fifth Amendment.

Evidence adduced at the trial established that respondent was elected to the Executive Board of Local 10 of the ILWU in the years 1959, 1960, and 1961 (R. 34-35), that he attended thirty-one regular and special meetings of the Board during the indictment period (Gov. Ex. 7; R. 39, 47, 49), and that he took some active part in twenty-one of these meetings (*e.g.*, R. 50-60, 104).

According to the constitution of Local 10 (Gov. Ex. 2), the Executive Board is "the advisory board of the

Local" (Art. XVI, Sec. 10(a)). It consists of officers of the Local and 35 other members (Art. IV, Sec. 2(7); R. 68), and is given the power generally to conduct the Local's business.¹ The Local's secretary-treasurer testified that the usual "channel of procedure" was to funnel the business of the union through the Executive Board, subject to final approval by the members (R. 186).

Witnesses testified that respondent, during a public meeting at Stanford University on May 23, 1960, stated, "I have been a member of the Communist Party for 25 years and I am now a member of the Communist Party" (R. 114, 126-128). Another government witness, who had been a member of the Communist Party, testified that she was present at sixteen different Communist Party meetings with respondent during the indictment period (R. 131-134). She fur-

¹ Art. XVI, Sec. 10, enumerates these powers:

* * * They shall have the power to adopt such measures as are deemed necessary from time to time for the good and welfare of the local, subject to the approval of the membership.

(b) The Executive Board shall attend to all matters referred to it by the local, also suggest remedies for immediate and permanent benefit and report to the regular meeting.

(c) They shall have the power to dispose of communications not of interest to the local and cooperate in every way so that the business to be covered at a regular meeting may be accomplished.

(d) In cases of emergency the Executive Board is empowered to act to protect the interests and welfare of the local.

(e) They must study the labor movement closely and formulate concrete policies to strengthen our local—said policies to be in accord with the I.L.W.U.

ther testified that respondent was chairman of the Rules Committee of both sessions of the District Convention of the Communist Party in November 1959 and February 1960 (R. 132, 135); that he was a delegate to the Party's 17th National Convention in San Francisco in late December 1959 (R. 133-134); that he attended and was active at numerous meetings of the District Committee of the Communist Party during 1960 and 1961 (R. 134-135, 136-143); and that he was chairman of a meeting of the Trade Union Commission of the Communist Party in December 1960 (R. 140-144).

Also introduced into evidence was a telegram of October 1, 1959, addressed to Harry Bridges, president of the ILWU, from the then Secretary of Labor, James B. Mitchell. The telegram called Mr. Bridges' attention to Section 504 of the newly enacted Act and set forth that section substantially verbatim. It requested that Mr. Bridges advise whether any ILWU personnel fell within its prohibition (R. 43-44). A reply to this telegram, dated October 9, 1959, respectfully declined to comply with the request (R. 44-46). Subsequently, a letter was sent to all ILWU locals by the secretary-treasurer of the ILWU, enclosing the Mitchell-Bridges correspondence and stating that the ILWU attorneys had advised that any inquiries of local unions similar to Secretary Mitchell's inquiry be transmitted to counsel and the International Union (R. 46-47).

The evidence also showed that at a caucus of the delegates from the Northern California District to the

17th National Convention of the Communist Party in New York City, respondent was nominated for the office of national committeeman representing the Northern California District (R. 144). The Chairman of the Northern California District, who was presiding at the caucus, stated that he felt that it would be unwise for respondent to accept that nomination because respondent had been elected to an office in his union as a possible test case for the Landrum-Griffin Bill (R. 144). Respondent replied that "this was true and that he felt it was far more important that he continue with that activity rather than accept nomination for the national committee, because he had been elected to the office with the understanding of the leadership of his union" (R. 144).

SUMMARY OF ARGUMENT

This case concerns the constitutionality of the provision of 29 U.S.C. 504 which makes it a criminally punishable offense for a member of the Communist Party to serve in any of an enumerated list of leadership positions in a labor organization. This provision was enacted in 1959 as a substitute for Section 9(h) of the National Labor Relations Act (as amended by the Labor Management Relations Act of 1947), which had conditioned a union's access to the National Labor Relations Board on the filing of non-Communist affidavits by all the union's officers. Section 9(h) which, like the challenged provision in this case, was intended to eliminate Communist Party members from leadership position in the labor movement, was

sustained by this Court against a constitutional challenge in *American Communications Association v. Douds*, 339 U.S. 382. The constitutional principles underlying the *Douds* decision apply to the provision involved in this case, and those principles are still valid today.

The Court held in *Douds* that Congress could permissibly exercise its interstate-commerce power to eliminate the danger of "political strikes" by keeping from union leadership the class of persons who would be likely to engage in such disruptive activity—i.e., those whose allegiance is to a cause which seeks the overthrow of the government by force and violence. It observed that Section 9(h) had an indirect effect on freedom of association in that it discouraged lawful membership in the Communist Party, but it upheld the statute notwithstanding this incidental effect on First Amendment liberties.

Section 504, like Section 9(h), does not directly restrict speech or association but touches these constitutionally protected liberties only conditionally. Its primary concern is conduct—serving in union offices—which, if committed by individuals responsive to the directions of a foreign-dominated power, presents a grave threat to our national economy. To the extent that the challenged provision has an impact on speech or association, it affects relatively few individuals and restricts them only conditionally, i.e., only if they retain their union offices. On the other hand, the statute preserves the integrity of labor unions,

which, under the National Labor Relations Act and its amendments, have been delegated quasi-governmental powers over their members. It also shields interstate commerce from the crippling effect of "political strikes" which serve no legitimate purpose and which benefit only the world Communist movement. Those results could not be achieved by any less "drastic" means than the kind of statute represented by Section 504 and its predecessor, Section 9(h).

In enacting Section 504 Congress had before it not only the results of the investigations conducted prior to the enactment of Section 9(h), which established the danger of political strikes, but also the fruit of legislative investigations subsequent to 1947. These inquiries showed that Communist infiltration into the labor movement had not ceased with the enactment of Section 9(h) but was a continuing menace.

The investigations, as well as the history of the administration of Section 9(h), also demonstrated that there were significant flaws in the remedy provided by Section 9(h), which produced inequitable results. The affidavit provision was resented by union officials; it created serious administrative burdens; it did not effectively prevent Communists from assuming union office; and the criminal sanction for false filing was inadequate to deter the submission of untruthful statements. Even more serious was the unfairness of the indirect "discouragement" which Section 9(h) imposed. By being denied access to the

National Labor Relations Board, innocent union members were forced to suffer for their officers' refusal to file the required affidavits, and the indirect remedy put the power to enforce Section 9(h) in the hands of employers rather than in the hands of the government. The challenged provision in this case was enacted as a more fair and reasonable method of achieving the desired result.

The court of appeals erred in concluding that Section 504 was more severe than Section 9(h). The history of Section 9(h)'s administration discloses that the success of nearly all major unions depended upon access to the National Labor Relations Board. Hence freedom of lawful association with the Communist Party was not promoted by giving a union the option of retaining a Communist officer and relinquishing access to the Board. The practicable course (and that taken by many members of the Communist Party who wished to retain union office) was to file false non-Communist affidavits. This left the members open to criminal prosecution under 18 U.S.C. 1001—a consequence which is almost identical to the remedy provided in Section 504(b).

ARGUMENT

In *American Communications Association v. Douds*, 339 U.S. 382, this Court sustained the constitutionality of Section 9(h) of the National Labor Relations Act as amended by the Labor Management Relations Act of 1947, 61 Stat. 146, which conditioned the right of a union to use the facilities of the National Labor

Relations Board upon the filing of affidavits by the union's officers attesting that they are not members of or affiliated with the Communist Party (pp. 3-4, *supra*). In enacting the Labor-Management Reporting and Disclosure Act of 1959, Congress repealed Section 9(h) and, in order to achieve the same result as Section 9(h) was intended to produce, substituted for that statute the provision which is under constitutional attack in this case.² We submit, for reasons stated fully below, that the constitutional principles set forth in the *Douglas* decision are still valid and applicable to this case; that the threat of political strikes and other improper disruptions of interstate commerce, which prompted the enactment of Section 9(h) in 1947, also warranted the enactment of a similar protective measure in 1959; that the law then enacted—29 U.S.C. 504—remedied many of the inequities and administrative difficulties of Section 9(h) which emerged during the twelve years of its enforcement, while achieving much the same practical result as Section 9(h); and that none of the differences between Section 9(h) and Section 504 justifies a finding that the latter is unconstitutional.

² The only provision involved in this case is that part of Section 504 which prohibits a *current* member of the Communist Party from holding union office. Different questions would be presented, of course, in a case in which a person who had resigned from the Communist Party within five years prior to his election was convicted under Section 504. When we speak of "Section 504" throughout this brief, we refer only to that portion of it which prohibits *simultaneous* membership in the Communist Party and service in any of the enumerated union positions.

CONGRESS MAY, CONSISTENTLY WITH THE FIRST AMENDMENT, ENACT A STATUTE AIMED AT KEEPING MEMBERS OF THE COMMUNIST PARTY FROM POSITIONS OF POWER IN THE LABOR MOVEMENT

A. THE CONSTITUTIONAL PRINCIPLES OF *AMERICAN COMMUNICATIONS ASSOCIATION V. DOUDS* APPLY TO THIS CASE

In 1950 this Court, by a vote of five-to-one (with three Justices not participating), sustained the constitutionality³ of Section 9(h) of the National Labor Relations Act (as amended by the Labor-Management Relations Act of 1947) insofar as it required all officers of unions seeking to use the facilities of the National Labor Relations Board to file affidavits stating that they were not members of or affiliated with the Communist Party.³ *American Communications Association v. Douds*, 339 U.S. 382. See also *Osman v. Douds*, 339 U.S. 846. The *Douds* decision was based on the stated propositions (1) that "Congress had a great mass of material before it which tended to show that Communists and others proscribed by the statute had infiltrated union organizations not to support and further trade union objectives * * * but to make them a device by which commerce and industry might

³ A severable provision of Section 9(h) also required each affiant to state "that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." This provision, which has no counterpart in the statute here in question, was the basis of the partial dissents in *Douds* by Justices Frankfurter and Jackson.

be disrupted when the dictates of political policy required such action" (339 U.S. at 389); (2) that "Congress may, under its constitutional power to regulate commerce among the several States, attempt to prevent political strikes and * * * that the remedy provided by § 9(h) bears reasonable relation to the evil which the statute was designed to reach" (339 U.S. at 390-391); (3) that "Section 9(h) is designed to protect the public not against what Communists and others identified therein advocate or believe, but against what Congress has concluded they have done and are likely to do again" (339 U.S. at 396); (4) that "[w]hen particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented" (339 U.S. at 399); (5) that "the public interest in the good faith exercise of [union] power is very great," while the effect of Section 9(h) on the rights of speech and assembly is only an indirect "discouragement" (339 U.S. at 402); (6) that "[t]he 'discouragements' of § 9(h) proceed, not against the groups or beliefs identified therein, but only against the combination of those affiliations or beliefs with occupancy of a position of great power over the economy of the country" and it "leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions which Congress has concluded are being abused to the injury of

the public by members of the described groups" (339 U.S. 403-404); and (7) that "Congress should not be powerless to remove the threat [of political strikes], not limited to punishing the act" (339 U.S. at 406).

These principles are, we submit, entirely sound, and they are as applicable to the present case as they were to *Douds*. As the legislative history of Section 504 conclusively demonstrates (pp. 36-40, *infra*), it was enacted in 1959 to meet the very same problem that moved Congress to pass Section 9(h) in 1947. This Court observed in another decision involving Section 9(h) that the purpose of that statute was "to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government.'" *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U.S. 322, 325. Section 504, on its face, carries out this purpose, and it obviously does so much more directly than did its predecessor.

Reserving for a later section of our argument an analysis of the particular distinguishing characteristics between Section 9(h) and Section 504 which impelled the Court of Appeals for the Ninth Circuit to hold that the latter statute is unconstitutional (see pp. 41-47, *infra*), we submit that insofar as Section 504 singles out Communist Party members and bars them from positions of power in labor unions it is a permissible regulation of interstate commerce, and does not violate the First or Fifth Amendment. This conclusion is supported by the constitutional princi-

ples articulated in *Douds* and confirmed by subsequent decisions.

First, it is clear that Congress' concern that Communist union officers may call political strikes—based on substantial legislative inquiry before the passage of Section 9(h) in 1947 and Section 504 in 1959 (see pp. 24–28, 36–40, *infra*)—comes well within Congress' regulatory power over interstate commerce. In the absence of any countervailing constitutional right, it would be entirely within Congress' discretion to choose the means whereby to prevent the unjustified disruption of commerce caused by political strikes, just as it is within Congress' power to determine how to deal with other kinds of interference with interstate commerce. See *Heart of Atlanta Motel, Inc. v. United States*, No. 515, this Term, decided December 14, 1964, p. 20. If, as Congress has determined, the danger of political strikes and other forms of labor unrest inconsistent with the national labor policy is substantially increased when members of the Communist Party occupy positions of control in labor organizations, it is a permissible exercise of the commerce power for Congress to take appropriate steps to eliminate this danger.

Second, the challenged provision in this case, like the statute in *Douds*, is designed not to restrain the dissemination of ideas by Communist Party members or even to reduce membership in or affiliation with the Communist Party; it is aimed only at preventing persons who are members of the Communist Party from assuming positions wherein they may exercise powers

which endanger the national economy. In other words, Section 504 is a prophylactic measure directed at preventing future conduct, not at punishing past speech or deterring prospective association. The most that can be said against it is that the conduct at which it is aimed is "intertwined with expression and association"—a characteristic which does not make it immune from regulation. *Cox v. Louisiana*, No. 49, this Term, decided January 18, 1965. Since its primary thrust is not at First Amendment liberties as such, Section 504 (like Section 9(h)) is entitled to be tested under a different standard of constitutionality from statutes which attempt directly to control speech or association. This distinction, fully articulated in the *Douglas* opinion (339 U.S. at 396), has been subsequently approved by this Court in *Dennis v. United States*, 341 U.S. 494, 502-511, and in *Speiser v. Randall*, 357 U.S. 513, 527, where, in speaking of cases like *Douglas*, the Court said:

In these cases, * * * there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. The purpose of the legislation sustained in the *Douglas* case, the Court found, was to minimize the danger of political strikes disruptive of interstate commerce by discouraging labor unions from electing Communist Party members to union office. While the Court recognized that the necessary effect of the legislation was to discourage the exercise of rights protected by the First Amendment, this consequence was said to be only indirect. The congressional purpose was to achieve an objective

other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially. The evil at which Congress had attempted to strike in that case was thought sufficiently grave to justify limited infringement of political rights. Similar considerations governed the other cases. Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public.

See also *Konigsberg v. State Bar*, 366 U.S. 36, 50-51, 54.

Third, since one of the components in the applicable test of constitutionality is the seriousness of the incidental impact which the statute has on First Amendment liberties, it is important to observe that in this case, as in *Douds*, the sum total of the harmful effect of the regulation is that it "results in an indirect, conditional, partial abridgment of speech." 339 U.S. at 399. Section 504, like Section 9(h), "touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint." 339 U.S. at 404. It also permits those few who are affected to maintain their affiliations and beliefs subject only to the loss of positions "which Congress has concluded are being abused to the injury of the public by members of the described groups." *Ibid.* Cf. *United States v. Har-*

riss, 347 U.S. 612, 625-626; *Lathrop v. Donohue*, 367 U.S. 820, 842-844.

Fourth, any assessment of the evil at which Section 504 (like Section 9(h)) was directed must be based not only on the concrete facts regarding the threat to interstate commerce presented by Communist control of labor unions which were developed during legislative investigations and other studies (pp. 24-28, *infra*), but also on the substantial authority which Congress has delegated to labor organizations by virtue of the National Labor Relations Act and its subsequent amendments. Having "seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents" (*Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202), it was surely within Congress' power to conclude that it was then necessary, just as it might be if a quasi-legislative body were actually involved (see *Gerende v. Board of Supervisors*, 341 U.S. 56), "to protect the * * * service by establishing an employment qualification of loyalty to the State and the United States. * * * [Such a qualification would be] reasonably designed to protect the integrity and competency of the service." *Garner v. Los Angeles Board*, 341 U.S. 716, 721. Labor unions are not mere voluntary associations to be left to their own devices. They occupy a unique position under this country's national labor policy, and their activities are subject to a full network of federal regulation which includes restrictions on the eligibility of candidates for union office (other than the one involved in this case) and the manner in which elections and other ballots are to be held.

29 U.S.C. 411, 481-483, 504; see *Calhoon v. Harvey*, No. 17, this Term, decided December 7, 1964; *American Federation of Musicians v. Wittstein*, No. 27, this Term, decided December 7, 1964.⁴ It is certainly appropriate therefore, for Congress to protect these vessels of national economic policy against possible misuse by those who would employ them to serve the political ends of a foreign power which seeks to achieve worldwide domination. Today, even more than when *Douglas* was decided, is the "authority [of labor organizations] derive[d] in part from Government's thumb on the scales," and now, at least as much as a decade and a half ago, can it be said that "the public interest in the good faith exercise of that power is very great." 339 U.S. at 401-402.

Fifth, since an essential element of the test of constitutionality in this area is whether "less drastic means for achieving the same basic purpose" are

⁴ Section 2(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401(a), states the underlying legislative finding:

The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

available (*Shelton v. Tucker*, 364 U.S. 479, 488; *Aptheker v. Secretary of State*, 378 U.S. 500, 512-513), it is relevant to inquire whether other courses could have been chosen by Congress to achieve the end towards which Section 9(h) and Section 504 are directed. We respond to the claim that Section 504 is unconstitutional because it is assertedly more "drastic" than Section 9(h)—the basis for the court of appeals' conclusion—at pp. 41-45, *infra*. The further argument that either remedy is inappropriate because Congress could have dealt with political strikes simply by prohibiting them under pain of criminal penalty was squarely answered by this Court in *Douglas* (339 U.S. at 406): "The fact that the injury to interstate commerce would be an accomplished fact before any sanctions could be applied, the possibility that a large number of such strikes might be called at a time of external or internal crisis, and the practical difficulties which would be encountered in detecting illegal activities of this kind are factors which are persuasive that Congress should not be powerless to remove the threat, not limited to punishing the act."

Nor can it be said here, as it was in *Aptheker v. Secretary of State*, 378 U.S. 500, that the statute "sweeps too widely and too indiscriminately across the liberty guaranteed * * *." 378 U.S. at 514. Apart from the fact that the "liberty" involved in *Aptheker* was not the freedom of association which a passport applicant had exercised in the past by joining a Communist-action organization but the right to travel

which was being denied when he could not obtain a passport (whereas the right to be a union officer—the parallel prospective right being asserted here—is not a constitutionally protected “liberty”), there are major differences of scope between the passport restriction of the Subversive Activities Control Act on the one hand and Section 9(h) and Section 504 on the other: The former covers individuals who do not know that the group of which they are members is a Communist-action group (378 U.S. at 509–510); the latter are limited to members of the Communist Party itself. While the former effectively prohibits foreign travel regardless of its purpose and the sensitivity of the area to which travel is sought (378 U.S. at 511–512), the latter are confined to a much more particularized kind of conduct—neither union membership nor any type of employment other than as an officer or policy-making employee of a union is prohibited. Hence Sections 9(h) and 504 “are more discriminately tailored to the constitutional liberties of individuals” (378 U.S. at 514) than the passport restriction both in terms of the individuals covered by the statute and in terms of the activity foreclosed to the defined class.

It is true that one of the vices of the statute held unconstitutional on its face in *Aptheker* was that it rendered “irrelevant the member’s degree of activity in the organization and his commitment to its purpose” (378 U.S. at 510), and the challenged provision in this case is similar, in that respect, to the statute involved in *Aptheker*. But the significance of this generalization surely depends on the statutory context in which it is found. With the statute involved in

Aptheker, Congress wished to restrict the freedom of Communist agents to travel abroad and act as couriers for ventures in espionage or sabotage. This Court held that the same result could have been achieved if, in the passport screening process—as in federal employment—membership in a Communist-action group would be “one factor to be weighed” (378 U.S. at 513) rather than an absolute disqualification. In determining whether or not to issue a passport under such a hypothetical standard, the Secretary of State might then consider “the member’s degree of activity in the organization and his commitment to its purpose.”

But there is no similar administrative process whereby candidates for union office are evaluated and their qualifications approved. Hence the statute itself must incorporate a definite standard whereby the legality of future conduct can be determined. In light of the otherwise narrow compass of the statute and the fact that the threatened danger may be presented even by persons whose membership in the Communist Party falls short of the active and knowing participation required to violate the “membership clause” of the Smith Act (see, *e.g.*, *Noto v. United States*, 367 U.S. 290), Congress was certainly warranted in drawing the line at Communist Party membership, regardless of the particular member’s activity or commitment. Moreover, here, as in *United Public Workers v. Mitchell*, 330 U.S. 75, 100–101, where a similar contention was made and rejected, what Congress may have feared was “the cumulative

effect" which a contrary rule might have. If, for example, it were permissible for inactive or less-than-fully committed Communist Party members to become union officers, the combination of two or more such persons in power in any particular labor union might reinforce the views of each and thereby produce the very evil which Congress sought to prevent.

In summary, we submit that the principles applied in *Douglas* to sustain Section 9(h) are valid today and warrant rejection of respondent's claim that Section 504 infringes on protected First Amendment liberties. And once the incidental impact of Section 504 on freedom of association is held to be constitutionally permissible, the provision amounts to nothing more than another federal regulation against conduct which gives rise to a conflict of interest in an area which is legitimately of federal concern. See the statutes cited in Judge Chambers' dissenting opinion in this case (R. 277). In *Board of Governors v. Agnew*, 329 U.S. 441, for example, this Court applied a statute which authorizes the Board of Governors of the Federal Reserve System to order the removal of an officer, director or employee of a member bank who is simultaneously a partner or employee of a partnership engaged principally in the underwriting of securities. The statute involved in *Agnew* provides a criminal sanction against the offending individual's retention of such dual capacity just as Section 504 does, even though that sanction (unlike Section 504) does not take effect until after the removal order is disobeyed.

B. LEGISLATIVE INVESTIGATIONS AND OTHER EVIDENCE SUPPORTED CONGRESS' DECISION IN 1959 THAT A SUBSTANTIAL THREAT TO THE ECONOMY WAS PRESENTED BY COMMUNIST INFILTRATION OF LABOR ORGANIZATIONS

In the *Doubs* decision this Court observed that Congress had before it, as a basis for its enactment of Section 9(h), "[s]ubstantial amounts of evidence * * * that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government." 339 U.S. at 388-389. When it enacted Section 504 in 1959, Congress had not only the information obtained prior to the 1947 legislation but also further evidence pertaining to the same subject which was produced at hearings after Section 9(h) was enacted. See Hearings before a Special Subcommittee of the House Committee on Education and Labor, *Investigation of Communist Influence in the Bucyrus-Erie Strike*, 80th Cong., 2d Sess. (1948); Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, *Communist Domination of Unions and National Security*, 82d Cong., 2d Sess. (1952); Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary, *Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill and Smelter Workers*, 82d Cong., 2d Sess. (1952); Hearings before Permanent Subcommittee on Investigations of the Senate Committee on

Government Operations, *Communist Infiltration in Defense Plants*, 84th Cong., 1st Sess. (1955); Hearings before the House Committee on Un-American Activities, *Communist Infiltration of Vital Industries and Current Communist Techniques in the Chicago, Illinois, Area*, 86th Cong., 1st Sess. (1959).

The later hearings produced evidence such as that given by an F.B.I. undercover informant who testified to conversations he had had with an official of the International Union of Mine, Mill, and Smelter Workers in 1950. The official, alleged to have been a member of the Communist Party, said that Communists within the union were making efforts "to see that a strike was called in the copper industry * * * to cut down production of copper for the Korean war effort." Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary, *Communist Domination of Union Officials in Vital Defense Industry—International Union of Mine, Mill and Smelter Workers*, 82d Cong., 2d Sess. (1952), p. 193. The union's vice-president subsequently testified before the subcommittee that strikes were called in 1950, but he denied that they were "directed" by the Communist Party. *Id.* at 245.

On the basis of this kind of testimony, Congressional investigating committees concluded that Communist infiltration of labor organizations was a continuing danger. In a 1953 report, for example, the Subcommittee on Labor and Labor Management Rela-

tions of the Senate Committee on Labor and Public Welfare concluded (*Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess. (1953), pp. 24-25):

(2) Communist-dominated unions are clearly identifiable as such because of the positive correlation of their policies with the shifting phases of the foreign policy of the Soviet Union.

(3) The affirmative evidence of direct action by Communist-dominated unions in support of Soviet Russian foreign policy is less conclusive but the potentialities of such direct action are visible.

(4) There is credible evidence that the correlation noted above is not coincidence but the direct outcome of direction by Communist Party functionaries.

* * * * *

(6) Communist-dominated unions are still operating in defense production, although in diminished strength. The existence of a few Communist-dominated unions in key industries may in times of war or threatened war constitute a real danger to the safety of the country. Espionage might be practiced through communications and sabotage be committed in the electrical, mining and smelting, and long-shore industries. We should not blink our eyes to these dangers.

The evidence heard by the Congressional committees and the conclusions they reached on the basis of this evidence more than adequately sustained Congress'

determination in 1959 to provide a "direct" remedy for the threat to the national economy presented by Communist domination of labor unions. The need for such legislation in 1959 was surely no less than the need in 1947.

Nor was concern over Communist infiltration into labor organizations limited to Congressional committees. In 1949 and 1950 the Congress of Industrial Organizations expelled eleven unions—among which were the International Union of Mine, Mill and Smelter Workers and the International Longshoremen's and Warehousemen's Union (which is involved in this case)⁵—because of their Communist domination. The reasons for the expulsion of these unions and the danger they posed to organized labor are spelled out in the *Official Reports on the Expulsion of Communist Dominated Organizations from the CIO*, compiled by the Publicity Department, CIO Publication No. 254 (Sept. 1954), and we have reproduced substantial excerpts from this document in our brief in *American Committee for Protection of Foreign Born v. Subversive Activities Control Board*, No. 44, this Term, Appendix B, pp. 210-219. The basis for fearing political strikes or other disruptive activity inimical to the interests of this country from Com-

⁵ The other nine unions were: United Electrical, Radio & Machine Workers; Farm Equipment Workers; American Communications Association; Food, Tobacco, Agricultural & Allied Workers Union of America; International Fishermen & Allied Workers of America; International Fur & Leather Workers Union; National Union of Marine Cooks & Stewards; United Office & Professional Workers of America; United Public Workers of America.

munist-dominated unions was summarized in the *CIO Reports* (p. 13) as follows:

The Communist Party is precisely this type of organization which the CIO is under a constitutional mandate to oppose—one which would use power to exploit the people for the benefit of an alien loyalty. The Communist Party speaks in the words of unionism and Americanism. But actually it matters not to the Communist Party whether a particular policy will advance or hinder the best interests of American labor. The sole test is whether the policy is required by the need of the Soviet Union. Only to the extent that the Soviet line permits will the propaganda mill of the Communist Party grind out platforms which are in consonance with the ideals of American labor. In event of conflict, however, between the needs of the Soviet Union and the best interests of American labor, the former must always prevail.

The danger to the national economy presented by these unions and other nonaffiliated Communist-dominated labor organizations could not, of course, be eliminated simply by expulsion from the CIO. Governmental action was necessary.

II

SECTION 504 IS A CONSTITUTIONAL SUBSTITUTE FOR SECTION 9(h)

The court of appeals held that the challenged provision is unconstitutional, not because it suffers from some infirmity which will also invalidate a statute like Section 9(h), but because, unlike Section 9(h), it is "far broader than the threat it is designed to meet"

and is, therefore, "unreasonably broad" (R. 259). This conclusion rests on the premise that Section 9(h) is, at least, a preferable means of achieving the legislative purpose and that it is a "less drastic" measure than Section 504. We submit, for reasons stated below, that not only could Congress reasonably prefer the approach taken by Section 504 (which is the appropriate test of constitutionality), but that this approach is, in fact, demonstrably sounder. And as for the assertedly "drastic" nature of Section 504, we show that its effect on the First Amendment liberties allegedly abridged is not significantly greater than the effect of Section 9(h). Accordingly, the decision in *American Communications Association v. Douds*, 339 U.S. 382, controls this case and requires that the judgment of the court of appeals be reversed.

A. SECTION 504 INCORPORATES A DEMONSTRABLY SOUNDER LEGISLATIVE APPROACH THAN SECTION 9(h)

It is clear that Congress' purpose in enacting Section 9(h) and Section 504 was to eliminate the threat of Communist-controlled political strikes by "wholly eradicat[ing] and bar[ring] from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government." *National Labor Relations Board v. Highland Park Mfg. Co.*, 341 U.S. 322, 325. Section 9(h) was structured to achieve this result not by a direct prohibition addressed to Communist Party members and to union leaders but by indirect "discouragement." By requiring all union officers to file non-Communist affidavits and then denying the facilities of the National Labor Relations Board to unions whose officers

had not filed the affidavits, Congress sought to apply the squeeze on union members in the expectation that potential Communist officers would feel the pinch. Section 504, on the other hand, announced a "flat prohibition" (R. 258).

The court of appeals' conclusion that the latter is "unreasonably broad" while the former is permissible must proceed from the premise that Section 9(h) is a more reasonable means of achieving the intended result. Surely the fact that one regulation assertedly results in a lesser abridgement of First Amendment liberties than another (but see pp. 41-45, *infra*) is not alone enough to characterize the greater abridgement as "unreasonable." One must also consider whether the narrower restriction would be, in fact, adequate to meet the anticipated evil and whether its other consequences (apart from the effect on constitutional liberties) would be unfair, unworkable or oppressive. Otherwise Congress would be deprived of its well-recognized legislative prerogative to choose the appropriate means for dealing with a public evil in light of the many factors comprising the public interest.

A comparison of the remedies provided by Sections 9(h) and 504 demonstrates that rather than being "unreasonably broad," the latter provision is more appropriately and fairly calculated to achieve the legislative purpose. The following are several of the shortcomings of Section 9(h) which were cured by Section 504:

1. *The affidavit requirement was considered offensive and prompted principled non-compliance.*—Sec-

tion 9(h) was an affront to the labor movement. It singled union officials out of the entire community and required them to swear that they were loyal. Mr. Justice Jackson, concurring and dissenting in *Doubs* (see note 3, *supra*), voiced the objections of many labor leaders when he said (339 U.S. at 434-435):

I am aware that the oath is resented by many labor leaders of unquestioned loyalty and above suspicion of Communist connections, indeed by some who have themselves taken bold and difficult steps to rid the labor movement of Communists. I suppose no one likes to be compelled to exonerate himself from connections he has never acquired.

The resentment had an effect on the administration of Section 9(h).⁶ Certain labor leaders—notably those in the United Mine Workers of America—refused to submit the required affidavits at any time during the 15-year life of Section 9(h). As a result, their unions were deprived of the facilities of the National Labor Relations Board even though there was no suspicion of Communist influence.

2. *The affidavit requirement created serious administrative burdens.*—Section 9(h)'s comprehensive affi-

⁶ In order to remove the affront it was even suggested that employers—i.e., officers of corporations subject to the National Labor Relations Act—be required to file similar affidavits. See *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess. (1953), pp. 24, 30; 1 Legislative History of the Labor-Management Reporting and Disclosure Act (hereinafter Leg. Hist. LMRDA) (1959), p. 366.

affidavit obligation posed obvious administrative difficulties for the Board. The total number of affidavits on file at any given time often exceeded 200,000 (e.g.; *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess. (1953), p. 5), and it was necessary for the Board to keep the records current by requesting new affidavits whenever a union election occurred or whenever the affidavits on file were more than twelve months old. Since compliance would have to be established before the issuance of a complaint by the Board, the Board had the difficult administrative task of keeping up-to-the-minute records on each union which could appear before it.

3. *The affidavit requirement did not stop Communists from assuming positions of leadership in labor unions.*—The Senate Subcommittee on Labor and Labor-Management Relations observed in 1953 that the effectiveness of Section 9(h) was substantially impaired by the fact that “well known Communist party followers signed the affidavits when they realized that it would be impossible for the unions to function without access to Board proceedings.” *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess. (1953), p. 6; see *id.* at 24. The only remedy available against these individuals was to prosecute them under 18 U.S.C. 1001 (*Leedom v. International Union of Mine, Mill & Smelter Workers*, 352 U.S. 145) for having submitted false sworn statements. Hence the effect of Section 9(h) under

these circumstances was to transform the intended restriction against Communists in union leadership positions into criminal charges under 18 U.S.C. 1001—an obviously inappropriate transposition.⁷

4. *The truth of the affidavits could not be adequately policed under 18 U.S. 1001.*—Prosecutions under 18 U.S.C. 1001 encountered serious obstacles for the reason given by the then Attorney General in a 1951 letter to the Chairman of the Senate Labor and Public Welfare Committee:⁸

Difficulty is experienced in the maintenance of prosecutions under this section because of the necessity of proving that an affiant at the time of the making of his affidavit was a member of the Communist Party or affiliated with the Party, or that he then believed in or was a member of or a supporter of an organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Testifying before the Senate Subcommittee of the Committee on Labor and Public Welfare in 1952, a

⁷ There were several successful prosecutions under the false-statements statute. See *Fisher v. United States*, 231 F. 2d 99 (C.A. 9); *Bryson v. United States*, 238 F. 2d 657 (C.A. 9); *Hupman v. United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953; *Lohman v. United States*, 266 F. 2d 951 (C.A. 6), certiorari denied, 361 U.S. 923; *West v. United States*, 274 F. 2d 885 (C.A. 6), certiorari denied *sub nom. Haug et ux. v. United States*, 365 U.S. 811; cf. *Killian v. United States*, 368 U.S. 231; *Travis v. United States*, 364 U.S. 631.

⁸ Quoted in Shair, *One More Year With 9(h)*, 3 Lab. L.J. 35, 38 (1952); see N.Y. Times, July 1, 1951, p. 17, col. 3.

representative of the Department of Justice offered a similar explanation:

Because of this requirement that the affidavit be couched in the present tense, a prosecution can be undertaken with some hope of obtaining a conviction only where it is possible to prove that on the very day the affidavit was executed the affiant was a member of the Communist Party, or affiliated therewith or was engaged in other proscribed conduct or mental processes. It is a simple matter for an individual to discontinue, formally, the prohibited membership, affiliation; and conduct and execute the prescribed affidavit on the next day and thus circumvent the law.

During hearings conducted in 1959 before the House Un-American Activities Committee in Chicago, union officials who had been identified as Communist Party members testified that Communist Party members had signed non-Communist affidavits after merely nominal resignation from the Communist Party.¹⁰

5. *Denial of Board facilities to unions was an inequitable remedy.*—Section 9(h)'s indirect "discouragement" is to deny the facilities of the Board to a union whose officer has not filed the required affidavit. This remedy is inequitable because it wreaks retribu-

⁹ Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, *Communist Domination of Unions and National Security*, 82d Cong., 2d Sess. (1952), p. 54.

¹⁰ See Hearings before the House Committee on Un-American Activities, *Communist Infiltration of Vital Industries and Current Communist Techniques in the Chicago, Illinois, Area*, 86th Cong., 1st Sess. (1959), pp. 519, 576.

tion on innocent union members for the misconduct of a single officer. "The section as written and as interpreted has the effect of depriving entire groups of workers of valuable economic privileges if an individual officer decides not to file affidavits, either because he cannot without risking prosecution or because he will not for reasons of principle." Morgan, *The Supreme Court and the Non-Communist Affidavit*, 10 Lab. L. J. 28, 43; see Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 35 n. 148 (1947).

6. *Denial of Board facilities to unions left enforcement of Section 9(h) in the hands of the employer.*—Section 9(h) did not prohibit employers from bargaining collectively with non-complying unions; it merely denied such unions access to the Board to enforce their rights against employers. Consequently, an employer could, if he chose, use a union's non-compliance as a devastating weapon to deny it recognition and to refuse to bargain with it. But if the union was strong, or if the employer favored it, he could sign a collective-bargaining agreement with it. The result was, in the words of the executive vice-president of the CIO, that Section 9(h) "place[d] in the hands of the employer, rather than of the Government, the decision of whether a particular union is to be penalized for Communist leadership." Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, *Communist Domination of Unions and National Security*, 82d Cong., 2d Sess. (1952), pp. 273-274.

7. *Denial of Board facilities resulted in delay and confusion.*—Since compliance with Section 9(h) was a condition precedent to the filing of a complaint by the Board on a union's behalf, the delays caused by negligent failure to comply or by the fact that filed affidavits had become outdated resulted in delayed processing of a union's charges. The effect of this was to penalize union members even when there was no suggestion whatever of any Communist participation in the affairs of the union.

8. *Denial of Board facilities created tensions within a union.*—Since Section 9(h) penalized the entire union for the conduct of a single officer or for the action of a voting majority in electing that officer, its tendency was to create dissension within such a union and possibly to produce the very kind of disruption of commerce which the statute was designed to prevent. It has been observed that the statute had this effect on the Electrical Workers organization. See Daykin, *The Operation of the Taft-Hartley Act's Non-Communist Provisions*, 36 Iowa L. Rev. 607, 627 (1951).

The above shortcomings and inequities of Section 9(h) are all attributable to its affidavit requirement or to the remedy it provides—i.e., denial of access to facilities of the National Labor Relations Board. Neither of those features is found in Section 504.

When Congress undertook in 1959 to re-examine various aspects of the National Labor Relations Act, as amended, its first reported version of what ultimately became the Labor-Management Reporting and

Disclosure Act (S. 1555, 86th Cong., 1st Sess.) eliminated the sanction of Section 9(h). Speaking generally of denying access to the Board as a means of coercing compliance with various other reporting requirements, the Senate Committee report stated (S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 9; 1 Leg. Hist. LMRDA 405):

To deny a union access to the National Labor Relations Board because its officers did not file a proper report is unwise for four reasons. First, it would be ineffective in the case of strong unions not dependent upon NLRB facilities; second, it is unfair to the members who have done no wrong but who would suffer both the denial of information and loss of NLRB protection; third, the rights and duties created by the National Labor Relations Act exist for the benefit of the public, and such legal obligations should be enforced equally in all cases, not traded off against one another as a system of rewards and punishments; and, finally, experience with a similar provision in the present law clearly demonstrates that conditioning the use of the NLRB processes on compliance with not wholly related requirements such as this can result in frustrating the principal purpose of the Labor Management Relations Act, that is, settlement of labor disputes in an orderly, efficient, and expeditious manner.

Hence the proposed bill substituted "a positive obligation to make full and accurate reports, subject to criminal penalties" (*ibid.*) for the conditional obligation previously imposed by Sections 9(f) and 9(g).

The bill would have substituted for Section 9(h) an obligation, resting on both union officers and employers, to file non-Communist affidavits. The obligation would have been enforced by the general criminal provision governing any willful violation or failure to comply with the provisions of the statute (Section 108(a), S. 1555, 86th Cong., 1st Sess.; 1 Leg. Hist. LMRDA 357) and by subsequent disqualification from service as a union officer (Section 305(b), S. 1555, 86th Cong., 1st Sess.; 1 Leg. Hist. LMRDA 380).¹¹

The Committee Report accompanying the bill explained that one of the guiding principles followed by the draftsmen of the legislation was (S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 7; 1 Leg. Hist. LMRDA 403):

3. Remedies for the abuses should be direct. Where the law prescribes standards, sanctions for their violation should also be direct. The Committee rejects the notion of applying destructive sanctions to a union, i.e., to a group of working men and women, for an offense for which the officers are responsible and over which the members have, at best, only indirect control. * * *

The committee does not believe that the record demonstrates that the imposition of indirect sanctions, such as penalizing the union and its members for malpractices of its officers, would be effective in insuring compliance. Moreover, on the basis of information available to this

¹¹ An exception was included for unions which did not use the facilities of the Board for a one-year period prior to the date on which the affidavit was due.

committee, it is clear that the requirements of present law with respect to the filing of financial and other data have hampered the administration of the National Labor Relations Act, have disrupted labor-management relations and have been expensive to administer.

With respect to Section 9(h), the Committee noted several advantages over the then-existing law (S. Rep. 187, *supra*, at 35; 1 Leg. Hist. LMRDA 431):

First, the non-Communist oaths submitted under section 122 of the bill would be subject to the full investigatory power of the Secretary and to the criminal penalties imposed for false filing, thus strengthening the effectiveness of existing provisions of law. Second, under these procedures there would be no question of the appearance of official governmental approval of a union because of a filing of an affidavit by an officer which is the case today. Third, by taking the filing requirement out of the machinery for settling labor management [disputes, the] NLRB would be relieved of a substantial administrative burden and a significant cause of delay in case handling would be eliminated.

The Committee explained this concluding reason as follows (S. Rep. 187, *supra*, at 35-36):

Finally, the committee believes that conditioning use of Board facilities on the filing of non-Communist affidavits has not been a satisfactory procedure. It has complicated and delayed the processing of cases before the Board and has had no material effect on improving safeguards against Communist infiltration.

The bill passed the Senate with these provisions. See 1 Leg. Hist. LMRDA 537, 545-546, 563. The House of Representatives, however, dropped the non-Communist affidavit requirement completely and substituted what is now Section 504. The Report of the House Committee on Education and Labor on H.R. 8342, the bill in which Section 504 first appeared in its present form, stated that this section had been adopted "as a more effective restriction against Communist infiltration of labor organizations than is contained in subsection (h) of section 9 of the National Labor Relations Act, as amended." H. Rep. No. 741, 86th Cong., 1st Sess. (1959), p. 33; 1 Leg. Hist. LMRDA 791. The House version was agreed upon at conference with one addition (see H. Rep. No. 1147, 86th Cong., 1st Sess. (1959), p. 36; 1 Leg. Hist. LMRDA 940), and it was enacted into law.

The above analysis and legislative history demonstrate that the two basic changes from the approach taken by Section 9(h) to that taken by Section 504—i.e., from an affidavit requirement to a "flat prohibition" and from the indirect remedy of denying the union facilities of the Board to the direct remedy of a criminal penalty against the offending officer—are deeply rooted in reason and in sound policy judgments. Rather than transforming the statute into an "unreasonably broad" provision (as the court of appeals believed), the 1959 enactment substituted a rational and enforceable statutory command for a circuitous and unworkable procedure which produced inequitable results.

B. SECTION 504 IS NOT A MORE "DRASTIC" ABRIDGMENT OF FREEDOM OF ASSOCIATION THAN SECTION 9(h)

The court of appeals held that Section 504 is unconstitutional because it exceeds Section 9(h) in "the quality of the restraint" (R. 257) on freedom of association and in "the force with which [the restraint] is applied" (R. 258). These distinctions between the statutes were held to affect the constitutionality of the 1959 enactment presumably because they significantly increased the restrictive effect which the applicable law imposed on First Amendment liberties. A closer analysis of the effect of the changes produced by the enactment of Section 504 demonstrates, we submit, that it did not substantially alter the incidental abridgment on free association which accompanied the predecessor statute and which was held to be constitutionally permissible by this Court in *Douglas*.

1. In condemning the "quality of the restraint"—i.e., the fact that Section 504 addresses its sanction "directly upon the individual" in the form of a "flat prohibition" (R. 258) rather than to the union which he represents—the court of appeals has, as we have shown (pp. 34–36, *supra*), mistaken a virtue for a vice. Apart from the administrative problems created by the affidavit requirement, it was certainly appropriate for Congress to transfer the burden of the consequences of a union official's refusal to comply with the statute from the members of his union to the official himself. By directing the sanction at the official personally, Congress has aimed the pressure of the statute at the source of the evil, and not at innocent third parties.

Equally significant is the fact that such a "direct" sanction does not really have a substantially greater impact on First Amendment liberties than the indirect "discouragement" of Section 9(h). The history of Section 9(h)'s administration has shown that most major unions are unable to function without the access to National Labor Relations Board facilities which is provided by the federal labor laws. Consequently, all but two of the major unions in the country¹² ultimately complied with the Section 9(h) affidavit requirement by the time of Section 504's enactment in 1959.¹³ As Congress found well before 1959, union officers who were members of the Communist Party were instructed to file false non-Communist affidavits and to risk the possibility of discovery and prosecution under 18 U.S.C. 1001.¹⁴ Several such persons

¹² The two exceptions were the International Typographical Union (AFL-CIO) and the United Mine Workers of America.

¹³ The compliance records of the National Labor Relations Board show, for example, that whereas 15,678 local unions had complied with the requirements of Sections 9(f), (g) and (h) in June 1951, this number increased to 19,614 in March 1954 and to 22,405 by March 1957.

¹⁴ The committee report accompanying S. 1555 stated:

The assumption upon which the present non-Communist affidavit requirement was based is that officers of unions who were Communists would not file affidavits. This assumption, on the basis of the record, has not proved sound. As the Department of Justice indicated to the committee, the Communist Party after passage of the non-Communist affidavit requirement "instructed its members who were union officers to file affidavits and to continue their party membership on a secret basis." Indeed, the record clearly demonstrates that the officers of unions alleged to be Com-

were, in fact, successfully prosecuted under 18 U.S.C. 1001. See cases cited in note 7, *supra*. Hence the restrictive effect of Section 504 was no more serious than that of Section 9(h). For if, as the compliance records demonstrate, a union did not really have the practical alternative of doing without Board remedies and electing Communist Party members to union office, a Communist Party member who wished to become a union officer was as fully denied the right to retain Communist Party membership, as if a "flat prohibition" or statute applicable "directly upon the individual" were on the books. His only other choice was to retain Communist Party membership and submit a false affidavit—a course which would subject him to the risk of a criminal prosecution in which the issue would be—just as the issue is under Section 504—whether he was simultaneously a member of the Communist Party and an officer of the union (*i.e.*, at the time when the affidavit was executed).

2. This demonstrates, as well, that the court of appeals' second ground for concluding that Section 504 was more "drastic"—that it differed in "the force with which [the restraint] is applied" in that it operated "with the duress of criminal sanctions" (R. 258, 259) is also insubstantial. The practical consequences

munist infiltrated have been most punctilious about filing non-Communist affidavits. * * *

S. Rep. No. 187, 86th Cong., 1st Sess. (1959), p. 35; 1 Leg. Hist. LMRDA 431. See also *Public Policy and Communist Domination of Certain Unions*, S. Doc. No. 26, 83d Cong., 1st Sess. (1953), pp. 6-7, 24.

of Section 9(h) were, as we have shown, to make 18 U.S.C. 1001 the only effective deterrent. Prospective union officers who wished to associate with the Communist Party could not realistically weigh the non-criminal consequences of retention of such membership; it was just practically unfeasible for a union—particularly a small or weak one—to expect to be successful if it was denied access to the Board. Hence the non-criminal aspect of Section 9(h)'s sanction could simply be taken as an absolute bar. The only real choice remaining was to conceal Communist Party membership, file a false affidavit, and risk the possibility of criminal prosecution. That choice—without the affidavit requirement—is equally available under Section 504.

Moreover, it seems entirely clear that the criminal nature of the sanction does not really exert more "force" than if the remedy were civil. If, for example, Congress substituted for subsection (b) of Section 504 (p. 3, *supra*) a provision authorizing the Secretary of Labor to obtain injunctions against service by any Communist Party member in any of the capacities enumerated in subsection (a), the effect of the statute would be the same notwithstanding the absence of any criminal sanction. An individual in respondent's position could be enjoined and, if he were to disobey the injunction, criminal contempt proceedings might ensue. The prohibition would be equally absolute; and the "discouragement" for all but secret Communist Party members would be as effective as any criminal penalty. This is because the extent of abridgment of freedom of expression by laws such as Section 504 or Section 9(h) cannot

be measured simply by whether the statute is criminal or civil, or by whether it falls into one or another broad category of statutory measures. See Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 537-539 (1951).

Nor does the criminal sanction of Section 504 warrant the court of appeals' further suggestion that the statute would violate the Fifth Amendment if it were not "restricted to party members harboring specific intent to use union office to interrupt interstate commerce or actively and purposefully participating in furtherance of illegal party activities aimed at overthrow of the Government" (R₂ 261). Unlike *Scales v. United States*, 367 U.S. 203, and *Noto v. United States*, 367 U.S. 290, this case does not involve a criminal prosecution based solely on membership in the Communist Party; the offense in this case was committed when respondent combined his Communist Party membership "with occupancy of a position of great power over the economy of the country." *American Communications Association v. Douds*, 339 U.S. 382, 403-404. As we have previously observed (pp. 15-16, *supra*), this case—unlike *Scales* and *Noto*—involves a restraint primarily upon conduct, not upon speech or advocacy. It is intended to deter individuals from combining positions which create "tempting opportunities" (*Board of Governors v. Agnew*, 329 U.S. 441, 449) to perform acts inconsistent with the national labor policy. At most, it is a regulation of "conduct * * * intertwined with expression and association" (*Cox v. Louisiana*, No. 49, this Term, decided January 18, 1965) and thus distinguishable from regulations of speech as such. Mr. Justice

Jackson, concurring and dissenting in *Doubs*, clearly stated the reasons which distinguish this type of statute from the type of statute involved in *Scales* and *Noto* (339 U.S. at 434):

Counsel stress that this is a civil-rights or a free-speech or a free-press case. But it is important to note what this Act does not do. The Act does not suppress or outlaw the Communist Party, nor prohibit it or its members from engaging in any aboveboard activity normal in party struggles under our political system. It may continue to nominate candidates, hold meetings, conduct campaigns and issue propaganda, just as other parties may. No individual is forbidden to be or to become a philosophical Communist or a full-fledged member of the Party. No one is penalized for writing or speaking in favor of the Party or its philosophy. Also, the Act does not require or forbid anything whatever to any person merely because he is a member of, or is affiliated with, the Communist Party. It applies only to one who becomes an officer of a labor union.¹⁵

When a law is directed at advocacy alone—as in the “membership clause” of the Smith Act—it may be constitutional only if the defendant’s membership in the proscribed organization is such as to involve him actively and knowingly in its illegal endeavors. Otherwise, there is a substantial danger that persons who are engaged in constitutionally protected activity may be swept in under the criminal prohibition. But when the purpose of the law is to prevent conduct

¹⁵ Section 504 does “forbid” a member of the Communist Party from becoming a union leader, but in this regard it merely carries into effect the purpose of the statute. Consequently, this prohibition is not an added deterrent to free association.

which gives rise to conflicts of interest and membership in a proscribed organization is only one element of the offense, there is no such danger. Congress may then draw its net more broadly to bring within the first element of the offense all those who, according to objective and readily-determined criteria, are likely to present the danger.¹⁶

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY-1965.

¹⁶ There is no merit to respondent's contention—rejected by a majority of the court of appeals—that it was error for the district court to take from the jury the question whether the executive board of his local was the kind of executive board to which Section 504 applies. Even accepting respondent's version of the facts, the board to which he belonged qualified under the statute since it was authorized to act in cases of emergency and had other directorial functions. See note 1, *supra*. Under these circumstances, it was proper for the court to tell the jury what the law was as applied to this case (*Horning v. District of Columbia*, 254 U.S. 135), so long as it left to the jury, as it did (R. 233-241), the ultimate fact-finding of guilt or innocence.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 399

UNITED STATES OF AMERICA,

Petitioner,

VS.

ARCHIE BROWN,

Respondent.

**BRIEF AMICI CURIAE ON BEHALF OF THE AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN CALIFORNIA AND
THE AMERICAN CIVIL LIBERTIES UNION**

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**BRIEF AMICI CURIAE ON BEHALF OF THE AMERICAN CIVIL
LIBERTIES UNION OF NORTHERN CALIFORNIA AND
THE AMERICAN CIVIL LIBERTIES UNION**

I.

INTEREST OF AMICI

The American Civil Liberties Union and its Northern California affiliate file this brief pursuant to permission granted by the parties and filed with the Clerk of this Court. The Union has an enduring interest in guarding through legal action and other appropriate

means the guarantees of individual liberty set forth in the Constitution of the United States. The Union believes that the Act of Congress here in question, by narrowing the political and social liberties of the members of an admittedly lawful political association through a generalized finding of evil intent, is a dangerous threat to political freedom.

The statute seeks to partition off from a small minority the full guarantee of freedom of speech and association, the guarantee that liberty will not be taken without due process of law, and seeks to put members of the group under the sweep of a bill of attainder. The ACLU has never believed that the preservation of the liberties of the majority requires protection from the ideas and advocacy of those who would change our system of government. For these reasons, we joined many petitioners in asking this Court to find unconstitutional the oath requirement considered in *American Communications Association v. Douds*, 339 U.S. 382, and we now ask that the criminal penalty here in question be held void.

II.

STATUTE INVOLVED

29 U.S.C. § 504. *Prohibition against certain persons holding office; violations and penalties.*

(a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his

conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or

(2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,

during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment, unless prior to the end of such five-year period, in the case of a person so convicted or imprisoned, (A) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (B) the Board of Parole of the United States Department of Justice determines that such person's service in any capacity referred to in clause (1) or (2) would not be contrary to the purposes of

this chapter. Prior to making any such determination the Board shall hold an administrative hearing and shall give notice of such proceeding by certified mail to the State, County, and Federal prosecuting officials in the jurisdiction or jurisdictions in which such person was convicted. The Board's determination in any such proceeding shall be final. No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection.

(b) Any person who willfully violates this section shall be fined not more than \$10,000 or imprisoned for not more than one year, or both.

(c) For the purposes of this section, any person shall be deemed to have been "convicted" and under the disability of "conviction" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event, regardless of whether such conviction occurred before or after September 14, 1959.

III.

STATEMENT OF THE CASE

This case is the first application the provision of the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519) which forbids Communist Party members, and ex-Party members before the expiration of a five-year period, from serving as officers or, except in clerical or custodial positions, employees

of a "labor organization"¹ or group of employers dealing with a labor organization, or from serving as a labor relations consultant to a person engaged in an industry or activity "affecting commerce," 29 U.S.C. 504.

The record shows without dispute that the respondent, Archie Brown, has openly been a member of the Communist Party for many years. Nor is it disputed that Brown served as a member of the 35-man Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union and that these two statuses co-existed during the period mentioned in the indictment. It was just this co-existence which Congress sought to discourage by the now-repealed non-Communist affidavit provision of the Labor-Management Relations Act of 1947 (29 U.S.C. 159 [h]), and which Congress now seeks to punish by 29 U.S.C. 504. The legislative purpose of these laws, assuming that Section 504 may be considered as a replacement for Section 159(h), was found by this Court in *American Communications Association v. Douds*, 339 U.S. 382 (1950), to be protection against the danger that Communist Party members would be able to disrupt interstate commerce in times of emergency by precipitating or encouraging strikes for political reasons.²

¹The term is broadly defined by 29 U.S.C. 402(i) and (j).

²We submit that the government has overstated the case in suggesting in its opening brief (p. 8) that either Section 159(h) or Section 504 could "eliminate the danger of 'political strikes' by keeping from union leadership the class of persons who would be likely to engage in such disruptive activity . . ." (Emphasis added.)

Though respondent received a jury trial and did not admit or stipulate to the truth of the facts charged in the indictment, there were no disputed questions of fact for the jury to decide since respondent's individual attitudes were not in issue and neither was the question of his ability to abuse his power as a member of the Executive Board.³ By a motion to dismiss (R. 3-5) and motion in arrest of judgment (R. 19) respondent raised the issue of the validity of the statute claiming, *inter alia*, that it was a bill of attainder, abridged his right to freedom of speech, press and association, and deprived him of due process of law. The motions were denied and respondent was convicted, but his conviction was reversed on appeal by the Court of Appeals for the Ninth Circuit (*Brown v. United States*, 334 F.2d 488). That court found the statute an "unreasonably broad" restraint on freedom of association and "so wholly lacking in notice of the constitutionally essential components of the crime that it cannot be judicially narrowed." Thus it held Section 504 void as in conflict with the First and Fifth Amendments.

³Nor was the power of respondent's union to disrupt commerce in times of emergency made an issue. The proscription of the statute evidently applies just as forcefully to Local 10 of the Des Moines Harness Makers' Union as it does to the International Atomic Workers' Union, so long as both are "labor organizations" (see note 1, *supra*).

IV.

**SECTION 504 IS NOT SAVED FROM UNCONSTITUTIONALITY
BY AMERICAN COMMUNICATIONS ASSOCIATION v. DOUDS
BECAUSE THAT CASE IS UNSOUND AND THIS COURT HAS
NOT FOLLOWED ITS REASONING.**

This case, should the statute be upheld, would go further than *American Communications Association v. Douds*, 339 U.S. 382. Discouraging unions from choosing officers with Communist affiliations is less drastic than prohibiting their election, as this Court has pointed out. *Aptheker v. Secretary of State*, 378 U.S. 500, 512-513, n. 11. Furthermore, the *Douds* reasoning proceeds from the express assumption that the persons affected "have the will and power" to call political strikes "without advocacy or persuasion . . ." 339 U.S. at 396. This assumption was basic to the *Douds* line of reasoning, since it was the basis for the Court's conclusion that the statute was aimed at force, not speech, which made the clear and present danger test inapplicable. Congress was moving against "substantial evils of conduct that are not the product of speech at all." *Ibid.* The statute we now deal with is not limited to persons who occupy positions of power; indeed respondent occupies no such position. If he desired a political strike he could not "call" one "without advocacy or persuasion" or at all. He could bring one about only by convincing other members of the Executive Board and, even then, the Board's action would be subject to review and rejection by the membership.

Nevertheless, since the government contends that *Douds* controls, we believe it appropriate to argue

that the *Doubs* decision is unsound, that its authority has been greatly undermined, if not destroyed, by this Court's subsequent decisions, and that it should now be overruled.

There is, however, a more fundamental reason why *amici curiae* make this argument. *Doubs* is not merely a precedent in the ordinary sense. It is the bedrock case which legitimated a pernicious process of reasoning. This process starts with an assertion about the characteristics, the propensities, the intentions of a group. Individuals are then made to suffer restrictions of their freedom, or other harm, which can be explained only on the theory that they *personally* have these characteristics, propensities, or intentions. Yet no proof of individual possession of these qualities is required. No refutation of it is ordinarily permitted. Membership alone is sufficient to bring the individual within the blanket condemnation of the stereotype.⁴

It is only on the basis of such thinking that it would be possible to conclude, either in the *Doubs* case or in this one, that evidence that *some* communists have used union office to promote political

⁴Compare Macaulay's *Essays* (New York 1869) p. 668: "A man who should act, for one day, on the supposition that all the people about him were influenced by the religion which they profess, would find himself ruined before night; and no man ever does act on that supposition in any of the ordinary concerns of life, in borrowing, in lending, in buying, or in selling. But when any of our fellow creatures are to be oppressed, the case is different. Then we represent those motives, which we know to be so feeble for good, as omnipotent for evil. Then we lay to the charge of our victims all the vices and follies to which their doctrines, however remotely, seem to tend. We forget that the same weakness, the same laxity, the same disposition to prefer the present to the future, which make men worse than a good religion, make them better than a bad one."

strikes justifies barring *all* communists from *all* union offices or positions.

The *Douglas* Court expressly stated that communists "carry on legitimate activities," 339 U.S. 382, 393. But it did not face the fact that this precludes holding an individual responsible for illegitimate activity on the mere showing of membership. The *Douglas* opinion does not treat Communist Party members as individuals, each having his own characteristics and each entitled to be judged on his own merits and record. It treats them as fungibles. It is sufficient that Congress has come to conclusions about what "they" (i.e., communists generally) "have done and are likely to do again." *Id.* at 396.

Virtually every threatened or accomplished limitation of our constitutional liberties for the past 15 years has employed this process for its justification. It is likely to continue to haunt us (and not only in cases involving communists) until this Court grapples with the *Douglas* case, not by limiting or qualifying or distinguishing it, but by recognizing and repudiating its basic fallacy.

The corrosive reasoning process which *Douglas* legitimized is at the heart of 29 U.S.C. 504. It subjects respondent to penalties which can be justified only if he is a man whose propensity for indulging in political strikes, or his intention to do so, makes him a person whose officership in a labor union would be too dangerous to be tolerated. Without this, the conduct for which he is being prosecuted is not pertinent to any substantive evil which Congress has a right to

prevent or punish. Without this, there is no "substantial regulatory interest" which, even under the balancing test, could justify restricting respondent's freedom of association. *NAACP v. Button*, 371 U.S. 415, 444. Yet this indispensable premise had not been proved by any evidence addressed to respondent's personal qualities and record. Neither this premise, nor the blanket assertion from which it was derived, has been proved in any proceeding to which he was a party. Cf. *Noto v. United States*, 367 U.S. 290, 299; *Yates v. United States*, 354 U.S. 298, 330; *Renaud v. Abbott*, 116 U.S. 277, 288. Nor was respondent given the opportunity to rebut either assertion. Cf. *Mobile, J. & K.C. R. Co. v. Turnipseed*, 219 U.S. 35, 43.⁵

Fortunately, since 1950 the *Douglas* principle that Communist Party members may be treated as fungibles has been departed from in case after case. Thus this Court has recognized that, assuming that some members of the Communist Party had illegal aims and engaged in illegal activities, "it cannot automatically be inferred that all members shared their evil purposes or participated in their unlawful conduct." *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 246. This is directly contrary to *Douglas* and means that the evidence Congress heard about some communists engaging in political strikes could not ipso facto justify its conclusion that each and every communist is unfit for union office.

⁵Respondent's effort to introduce rebuttal evidence was rebuffed by the trial Court, *Brown v. United States*, 334 F.2d 488, footnote 4, and the statute does not appear to make this matter pertinent.

If specific intent to overthrow the government cannot be deemed proved by a showing of mere membership or holding of office in the Communist Party, *Yates v. United States*, 354 U.S. 298, 331, can intent to engage in political strikes be so proved? And can criminal punishment or a deprivation of constitutional rights be justified without proof of such specific intent?

In *Scales v. United States*, 367 U.S. 203, 224-225, due process was held to require that the relationship between the conduct or status punished and the activity justifying regulation "must be sufficiently substantial to satisfy the concept of personal guilt . . ." Clearly Section 504 does not meet that standard. *Scales* also recognized that a blanket prohibition of association with an organization having both legal and illegal aims would endanger legitimate expression and association and that the statute must not cut so deep as to punish the members for whom the organization is a vehicle for the advancement of legitimate aims and policies. *Id.* at 229-230. Neither under Section 504 nor in *Douglas* was any effort made to encompass anything less than *all* members no matter what their aims or commitments.⁶

Finally, *Aptheker v. Secretary of State*, 378 U.S. 500, wove these strands together and demonstrated that any deprivation of a constitutional right turning on mere membership without requiring a further

⁶*Noto v. United States*, 367 U.S. 292, 299-300, warns against punishing a person "for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share."

showing of "plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes" (*Id.*, 12 L.Ed. 2d at 1002) sweeps too broadly and cannot stand. Such a law necessarily violates the principle that regulations founded upon association must be drawn with precision so that they will not punish or deter constitutionally protected activities.

We are not impressed with the government's effort to distinguish *Aptheker* on the ground that there is a constitutional right to travel, but no constitutional right to be a union officer (Brief for the United States, pp. 20-21).

"Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ." *Steele v. Louisville & Nashville RR Co.*, 323 U.S. 192, 202.

Is it possible that the right to participate in the councils of an organization which has been given quasi-governmental powers over one's work and livelihood is of less constitutional significance than the right to be a tourist? Whether or not there is any abstract right to be a union officer, constitutional protection must extend to one whose exclusion from union office by statute is based on unconstitutional standards. See *Wieman v. Updegraff*, 334 U.S. 183, 192.⁷

⁷It may be noted that the dissenting justices in *Aptheker* took the view that exclusion from union office imposed "more onerous burdens" than exclusion from passport rights. 378 U.S. 500, 527.

Respondent stands before this Court asserting more than his own rights. We must also consider the rights of those members of Local 10 who elected respondent to represent them on the Executive Board, evidently with knowledge of his affiliations. The members of Local 10 have a First Amendment right to consult with each other and that right "necessarily includes the right to select a spokesman who could be expected to give the wisest counsel," *Brotherhood of RR Trainmen v. Virginia*, 377 U.S. 1; 12 L.Ed.2d 89, 93. True, the members of Local 10 are not parties to this proceeding. Respondent, however, is the "appropriate representative" since they voted for him, and their rights, if not taken into account in this proceeding, cannot be "effectively vindicated" at all. *NAACP v. Alabama*, 357 U.S. 449, 459.

The process of reasoning legitimated in *Douds* threatens the gravest dangers, not only to First Amendment freedoms, but to American standards of justice. This process has been implicitly repudiated in *Schwabe*, *Yates*, *Scales*, *Noto*, and now *Aptheker*, yet it continues to be very influential and is likely to remain so until *Douds* is overruled.

V.

**SECTION 504 IS A BILL OF ATTAINDER BOTH ON ITS FACE AND
AS APPLIED TO RESPONDENT IN THIS CASE**

A. The Meaning and Background of Bill of Attainder

Clause 3 of Section 9 of Article I of the United States Constitution unqualifiedly forbids Congress to pass a bill of attainder in the following words:

No bill of attainder or ex post facto law shall be passed.

Although attainder had the historical meaning of punishment by death, the landmark case of *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 indicated, at p. 323, that its use in the Constitution was broader:

A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.

Bills of attainder were in common use in Great Britain as a powerful and useful weapon against political dissenters from early days, and they remained in use in England throughout the 17th and early 18th centuries. See *Ex Parte Law*, 15 Fed. Cas. 3, No. 8126 (scholarly opinion by Erskine, J.); Cooley, *Constitutional Limitations* (8th Edition), 297, 547. It was not only the dread of attainders as used in England which made the drafters of the Constitution absolutely forbid their passage. Their pre-revolutionary use in the American colonies had made their provisions and

reach familiar. A famous example is the bill passed by the General Assembly of Virginia in 1676 inflicting punishment on the principal leaders of Bacon's rebellion against Governor Berkeley which included within the scope of the Act a large group of persons who were stated to have aided and abetted the plotters. See II Henning (Va.) *Statutes at Large* 373-374; II Story, *The Constitution*, 210-211. Other examples of American use of attainder will be found in *Annotation, What Constitutes Bill of Attainder Under the Federal Constitution*, 90 L.Ed. 1267, 1268-1270.

The first detailed discussion of the term "Bill of Attainder" in the Federal Courts came in the period immediately after the Civil War. During the reconstruction era, Congress and many of the state legislatures enacted statutes requiring, as a condition precedent to the exercise of certain political or civil privileges, the taking of an oath to the effect that an applicant had not participated in the "recent rebellion." In some of these statutes participation was defined so as to include, not only actual service in the Confederate armies, but also "sympathizing with" or "aiding" those forces.

Before the Supreme Court passed upon the constitutionality of this type of legislation, several challenges had arisen in the lower federal Courts. They tested the validity of a statute providing that no attorney could practice in the federal Courts without taking a test oath. In three cases, the act of congress imposing the test oath [12 Stat. 502 (1862) repealed, 23 Stat. 22 (1884)] was held unconstitutional.

In re Shorter, 22 Fed. Cas. 16, No. 12811 (D.C. Ala. 1865); *Ex Parte Law*, 15 Fed. Cas. 3, No. 8126 (D.C. Ga. 1866); *In re Baxter*, 2 Fed. Cas. 1043, No. 1118 (D.C. Tenn. 1866). The *Shorter* and *Law* cases held the oath to be void as enacting a bill of attainder; the *Baxter* case held the oath void as, inter alia, an ex post facto law and requiring self-incrimination.

In 1867 the Supreme Court in twin cases passed upon the constitutionality of the previously cited federal attorney's test oath statute, *Ex Parte Garland*, 4 Wall. (71 U.S.) 333 and on the constitutionality of the test oath clause of the Missouri Constitution. *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277. *Cummings v. Missouri* was an appeal from a criminal conviction of a priest who declined to take the test oath required by the Missouri Constitution as a prerequisite to functioning in the State as attorney, teacher, clergyman, corporate official, or in various other capacities. The oath required individuals to swear that they had never engaged in any past conduct hostile to the United States, or expressed any disloyal sentiments, or aided or abetted enemies of the United States.

The State of Missouri argued in *Cummings* that this requirement did not constitute a bill of attainder since it did not inflict any punishment. In support of this contention it was urged that "to punish one is to deprive him of life, liberty, or property, and to take from him anything less than this did not punish him at all . . ." (4 Wall. at 320). This contention was

effectively refuted by the Court in an opinion pointing out that any deprivation of rights freely available to others constituted a punishment. The Court's opinion reads in part:

The learned counsel does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage of the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the sources of the highest emoluments and honors. *The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in courts, or acting as an executor, administrator, or guardian; may also, and often has been, imposed as punishment.* (Emphasis supplied.)

* * *

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. (*Id.* at pp. 321-322).

In the *Garland* case the Court was required to pass on the constitutionality of the previously cited statute excluding from practice in the federal Courts attorneys who had not taken an oath as to their past loyalty to the United States. The Court held that the statute was unconstitutional as a bill of attainder, pointing out that deprivation of the liberty of practicing before the federal Courts could be "regarded in no other light than as punishment****" (4 Wall. at 377).

Lovett v. United States, 328 U.S. 303, is the most recent application of the bill of attainder prohibition. Section 304 of the Emergency Appropriations Act of 1943 (57 Stat. 431, 450) provided that none of the funds therein appropriated could be used to pay salaries to three named individuals. As the Court stated, the purpose of Section 304 was:

***To "purge" the then existing and all future lists of government employees of those whom congress deemed guilty of "subversive activities" and therefore "unfit" to hold a federal job. 328 U.S. 303, 314.

It was argued that Section 304 was not a bill of attainder since it was merely a means of effectuating Congress' power to determine the conditions of employment in the federal government and that denial of such employment did not constitute a "punishment."

The holding of the *Lovett* Court was that determination of "unfitness" to hold federal office by legislative finding of political subversion constituted

punishment without a judicial trial. The Court stated at 328 U.S. 303, 315, 316:

... Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the constitution. ***Section 304 was designed to apply to particular individuals. Just as the statute in the two cases mentioned [*Cummings* and *Garland*] it "operates as a legislative decree of perpetual exclusion" from a chosen vocation. This permanent proscription from any opportunity to serve the government is punishment, and of a most severe type.

B. Section 504 Is a Bill of Attainder on Its Face and as Applied in This Case

We think that there can be little doubt that one who reads 29 U.S.C. Sec. 504 in the light of the historical background described above must conclude that Congress has enacted a bill of attainder. The statute provides criminal penalties for persons who are Communist Party members or have been members during the past five years and who hold office or employment in unions or certain facets of management. It is true that one can avoid the penal sanction, but only at the cost of undergoing another punishment, the loss of employment or position in union or certain management affairs. This punishment is meted out by the legislative branch for past conduct, to wit: lawful political affiliation and nothing more.

Just as the priest in *Cummings v. Missouri* could have avoided criminal liability by not preaching, respondent could have avoided criminal liability by resigning from his elected position. Just as Congress was only punishing a suspected proclivity for future misconduct in government service in *United States v. Lovett*, Congress is only punishing a suspected proclivity for political strikes in interstate commerce in the instant case. Just as the attorney in *Ex Parte Garland* could not expunge his activities during the Civil War, respondent could not expunge the fact that he had been a member of the Communist Party during the five years preceding the enactment of Section 504. In those three cases, as in the instant case, there was a legislative finding as to ascertainable members of a group so as to inflict punishment without a judicial trial.

The Brief of the United States (at page 11, footnote 2) asks this Court to give no consideration to the portion of Section 504 forbidding a person who "has been" a member of the Communist Party during the previous five years from holding union or management office or employment. The government assumes that this is a severable provision. We doubt that this is so. Without the five year "cooling off" period, Congress might never have passed the legislation because of the fear of pro forma resignations from the Communist Party. See Brief for the United States at pp. 32-33 and especially the cases cited in footnote 7.

It is also not the burden of respondent to guess as to whether the Courts will or will not hold a certain portion of a legislative enactment to be severable and invalid. On the face of this statute respondent was disqualified from union office and it would not have changed his position to have resigned his Communist Party membership. Thus respondent had no choice between union office and Party membership, even if such an election could constitutionally be forced upon him.

But even if the portions of Section 504 which make it an obvious bill of attainder may be excised, its application in this case is still within the prohibition. It is helpful to look on the bill of attainder prohibition as an aspect of the most basic concept of our constitutional government, the separation of powers. Congress may prescribe and proscribe conduct, but the judiciary, and only the judiciary, may adjudicate guilt. In this case, respondent's trial did not take place in the Court below but on the floor of Congress. The legislative branch has the power to prohibit persons loyal to another government from serving as union officers, and it has the power to prohibit persons who advocate or conspire to advocate political strikes from serving as union officers; but when Congress makes it indisputable that each and every member of the Communist Party will disloyally advocate political strikes and thus may not be union officers, that is a legislative finding of guilt. That is the punishment; that is the attain without trial, without judicially screened evidence.

This Court said in *United States v. Lovett*, 328 U.S. 303, 316:

No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd and Watson "guilty" of the crime of engaging in "subversive activities" defined that term for the first time, and sentenced them to perpetual exclusion from any government employment.

Yet if one substitutes "Communist Party" for the names mentioned in the above quotation and "political strikes" for "subversive activities" we have the exact situation of the instant case where respondent has been found "guilty" of a proclivity to engage in political strikes, without having had an opportunity to present a defense to the charge, and has been sentenced to exclusion from labor union (and management) employment and office.⁸ If this kind of guilt without judicial trial can be applied to one unpopular and hated group, then any unpopular minority group may likewise be stigmatized to its detriment. Compare *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123.

It was argued in the Court below that the prohibition of Section 504 is not "punishment" but "regulation" with a few side effects. This argument was buttressed by discussing those cases, such as *Trop v. Dulles*, 356 U.S. 86, and *Flemming v. Nestor*, 363

⁸The government's power over employment in labor unions should certainly not be any greater than its power over its own employees.

U.S. 603 which deal with the question, what is a penal statute? But we are not dealing here with side effects. Congress intended to punish those who violated Sec. 504. A statute providing for a year in prison could not be non-penal any more than a statute punishing bank robbers is non-penal because its legislative purpose was to provide security for depositors' funds.

The case of *De Veau v. Braisted*, 363 U.S. 144, was also discussed in the briefs below as providing a basis for the validity of the statute here involved. That case sustained the validity of a state statute forbidding persons who had been convicted of certain felonies from serving as union officers on the New York waterfront. However, the opinion of the Court was expressly premised on the fact that there had already been a judicial finding on the individual guilt of each person so restricted. The opinion stated at page 160:

The distinguishing feature of a bill of attainder is the substitution of a legislative for a judicial determination of guilt. See *United States v. Lovett*, 328 U.S. 303, 90 L.Ed. 1252, 66 S.Ct. 1073. Clearly, Section 8 embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction; and so it manifestly is not a bill of attainder.

It need not be emphasized that respondent in this case has never been found guilty of having a specific intent or desire to engage in political strikes.

We urge the Court to reassert the vitality of the bill of attainder prohibition and to condemn this statute as an exercise of that forbidden power.

VI.

CONCLUSION

If Section 504 is constitutional it would only be consistent to hold that Communist Party members can be punished for speaking at union meetings for fear that they will incite political strikes. Amici do not believe we have reached the point where a troublesome person or group may be "regulated" out of existence because a legislative body indisputably "finds" that his affiliations pose potential dangers to interests which that body has the duty to protect.

Amici also urge that Section 504 be condemned as a bill of attainder and an attempt by the legislative body to perform a judicial function without the safeguards of due process of law.

Dated, San Francisco, California,
February 25, 1965.

Respectfully submitted,

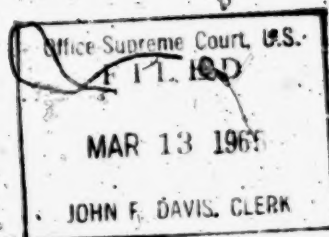
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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1964

No. 399

UNITED STATES OF AMERICA,

Petitioner,

VS.

ARCHIE BROWN,

Respondent.

On Writ of Certiorari to the United States Court
of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT

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"Alice in Wonderland", Peter Pauper Press, Mount Vernon, pages 157-158	43
"Democracy in America", by Alexis De Tocqueville, The New American Library, 1956; pages 97 and 98	69
"History of Labour Movement in the United States", Com- mons and Associates, The Macmillan Company, N.Y. 1918:	
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Pages 25, 68, 72	26
"Mussolini, Fascism", Ardita Publishers, Rome, 1935:	
Pages 11, 46	61
"Vishinsky, The Law of the Soviet State", Macmillan Co., N.Y. 1948:	
Pages 622 et seq.	61
1965 World Almanac, New York World-Telegram, N.Y., • 1965:	
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• Other Authorities

House Committee Hearings on Un-American Activities, 81st Cong., 2d Session:	
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BRIEF OF RESPONDENT

QUESTION PRESENTED

The Government defines the question in these words:
“Whether 29 USC 504, which makes it unlawful
for a member of the Communist Party to serve
as an officer, director, trustee, or member of the
executive board of a labor organization, is con-
stitutional.” (Govt. Br. 2.)

This formulation is both imprecise and incomplete.
It is imprecise because it glosses over the fact that

the statute, far from declaring the object of proscription to be "unlawful" (no such word, in fact, is found in the statute), or establishing an administrative method to regulate the manner or content of the service rendered to a union by a Communist Party member, or creating an injunctive proceeding to prevent the continuance of such service, or withdrawing any governmental privilege on account of it, or allowing any civil action or extraordinary writ to cope with any injury occasioned or threatened by it, provides solely and exclusively that it is a crime against the United States to be contemporaneously a Communist (or ex-Communist of less than five years standing) and a union official; for which, without proof of anything more, and to the exclusion of any consideration of personal intent or ability to commit a wrong, a man may be fined and imprisoned.

More accurate is the question to which seven of the eight Judges of the Court of Appeals addressed themselves:¹

¹Judge Merrill, in an opinion in which he was joined by Judges Jertberg, Koelsch, Browning and Duniway, held the statute to be violative of respondent's First and Fifth Amendment rights, and ordered Brown's conviction reversed and the indictment dismissed. Judges Chambers and Barnes, dissenting, voted to affirm. Judge Hamley, without reaching the same constitutional questions, wrote that he "would reverse and remand for a new trial" on account of the trial Court's direction to the jury that the Local's executive board on which Brown served was, as a matter of law, within the purview of the statute. His opinion expresses agreement with holdings in the Tird, Fifth and Sixth Circuits that such an instruction violates the respondent's constitutional right to a jury trial as guaranteed by the Sixth Amendment. (R. 276; 334 F. 2d 488 at 503.)

The fact that Judge Hamley's concern for respondent Brown's Sixth Amendment rights led him to vote for reversal on that

"... whether criminal punishment of any and all Communist Party members who become union officers, regardless of lack of intent to bring about the evil the statute was designed to prevent, or to further other unlawful aims of the Party, infringes the guarantees of the First and Fifth Amendments." (R. 254; 334 F.2d 488 at 492.)

The Government's formulation is incomplete because adequate treatment of the constitutional issues involved requires both mention and discussion of the fact that the statute punishes the holding of union office, not only by a person who is presently a Communist Party member, but also by anyone who, though having long since terminated Party membership, has held such membership at some time within the five years preceding his term of union office. The relevance of past Communist Party membership to the case here, arises from this Court's practice of appraising a statute's inhibitory effect upon First Amendment rights "in other factual contexts besides that at bar" (*NAACP v. Button* [1963], 371 U.S. 415 at 432.)

Because, therefore, the Government deals with this statute—a criminal statute—as though it were nothing more than a revised version, newly-outfitted in more

ground, is scarcely a basis for concluding that, if he had reached the questions decided by the majority, his concern for Brown's constitutional rights under the First and Fifth Amendments would have been any the less. The Government's statement, therefore that the "court, by a vote of 5 to 3, ordered the conviction set aside and the indictment dismissed. The court ruled that Section 504 * * * is unconstitutional under the First Amendment and under the due process clause of the Fifth Amendment"—(Govt. Br. 4), permits an inference, assuredly unintentional, that the constitutional issues decided by the Court were by the narrow margin of 5 to 3, when in fact they were not.

ingeniously designed but essentially undifferent raiment, of the same administrative procedure embodied in the now-defunct Section 9(h), its brief fails to come directly to grips with the towering constitutional obstacles that stand in the path of this incredible and unprecedented piece of legislation.

STATEMENT

Archie Brown, the respondent, has been a working longshoreman on the San Francisco docks for more than a quarter of a century. (R. 166-167, 183, 190.) During all of this time, it was his general reputation on the waterfront that he was a Communist. (R. 184.) Far from ever seeking to conceal his Communist affiliations, he made at a public meeting at Stanford University on May 23, 1960 a statement on which the Government here relies (Govt. Br. 5), "I have been a member of the Communist Party for 25 years and I am now a member of the Communist Party." (R. 114.) A Government witness, who had served as an undercover operative for the Federal Bureau of Investigation within the Communist Party, testified that Brown was known only by his true name both inside and outside Party circles. (R. 146.) Concerning the Communist meeting in New York described by her to which the Government refers (Govt. Br. 6-7), she said that Brown registered at the hotel under his true name. (R. 149.)

Four prominent and long-time leaders of the International Longshoremen's and Warehousemen's Union

testified that Brown enjoys among his fellow trade unionists a good reputation for law-abidingness. (R. 173, 184, 190, 193.) The esteem in which he is held by the union's members may be judged from the fact that he was elected to the executive board of his local union, Local 10, ILWU, for consecutive one-year terms in 1959, 1960 and 1961. (Govt. Br. 4; see also R. 34-36, 79.) In these years the membership of the local union numbered between 4,000 and 5,000 men. (R. 65-66.) The executive board consists of 35 persons elected to it by the membership (R. 71) plus six titled officers, likewise elected—president, honorary vice-president, secretary-treasurer, and three business agents (R. 67-68)—a total, therefore, of 41 persons.

Nominations for office are annually initiated by means of a written petition signed by at least 50 members in good standing; all nominations are presented and read aloud at two successive meetings of the union membership. Any member may object to a nominee and the membership votes upon the objection; all nominations must receive approval of the membership by a majority vote. (R. 68-70.) To insure that the elections for office are fairly held and that ballots are honestly counted, the union rents voting machines from the City and County of San Francisco, and employs City Hall personnel to supervise the distribution, voting, and tabulation of ballots. (R. 66-67.)

The evidence is uncontradicted that a strike by Local 10 can be called only after compliance with an elaborate procedure requiring in the first instance a

majority vote in a specially advertised meeting with not less than 1,000 members in attendance to constitute a quorum; followed by a secret referendum ballot of all union members of whom a majority must vote in favor of striking; and followed further by steps to secure strike sanction from the International Union. (Constitutions of International Union and of Local 10, Govt. Exs. 1 and 2; R. 32-33, 76-77.) Evidence that the local executive board has never called a strike was, upon motion of the Government, stricken from the record. (R. 75.) Defense efforts to prove that the union itself has not been involved in a strike since the year 1948 (R. 77-78), and that it received in the years 1960 and 1961 public commendation from the Assembly of the State of California and from the Mayor and Supervisors of the City and County of San Francisco for the "epochal achievement" brought about by the union and the employers "through the processes of peaceful collective bargaining," were rejected by the trial court. (R. 111-112, 193, 196.)

Brown's service on the board was established by the introduction in evidence of the minutes of executive board meetings. These showed him in attendance on numerous occasions, recorded the fact that he had been the author of some motions and had seconded others, and also that various resolutions or statements of position were offered by him from time to time. It was never denied by the defense that Brown was "serving" on the executive board (R. 52); in fact, the defense pressed on the trial court that one issue to be determined was whether "he did so with the

specific intent that his services thereon should bring about an interference with or disruption of interstate commerce (for political considerations)." (R. 41.) The Government stoutly contested the assertion that the content of Brown's actions was relevant to any issue here. Nevertheless, under the claim that it bore the burden of demonstrating Brown's "active," as contrasted with "passive" membership on the board, the Government selected from the minutes of the board, and read to the jury, a resolution submitted by Brown which was highly critical of the House Committee on Un-American Activities and of the San Francisco Police Department. (R. 52-54.) If, indeed, a burden of proving "active" membership existed because of this Court's decision in *Scales v. United States* (1961), 367 U.S. 203, it was a burden of proving not only that Brown was an "active" member, but, in the words of the Court, an active member "having also a guilty knowledge and intent" (at p. 228).

Since the Government was allowed to read portions of the minutes, the defense vigorously urged that there should be read into evidence "everything said or done" by respondent during his service on the executive board, and this was permitted. (R. 90.) From this evidence of all the actions taken by Brown and all the statements made by him during the 3 years he served as a member of the executive board, the jury could only have found that he never advocated or suggested illegal or other improper activity, that he had never proposed a political strike, and

that he never urged or engaged in any action whatsoever from which any criminal intent, or desire to disrupt commerce, could be inferred: (Govt. Ex. 7; R. 37, 40; Def. Exh. C; R. 109-110.) In final summation to the jury, however, the efforts of defense counsel to argue that this evidence should be considered in determining whether Brown possessed any criminal intent, were repeatedly interrupted by Government counsel, whose objections were uniformly sustained. (R. 223-233.) Moreover, stock instructions, such as are traditionally given in cases dealing with the subject of intent in criminal cases, though submitted, were refused. (R. 11-18.)

The Government introduced evidence that in 1959 the Secretary of Labor directed the attention of Mr. Harry Bridges, president of the International Union, to the provisions of Section 504, including that portion which makes it a crime for "any labor organization or officer thereof, knowingly and wilfully to permit any person to assume or hold any office or paid position contrary to" the prohibition against the holding of union office by a Communist Party member. This evidence showed that Mr. Bridges was requested to furnish the Secretary with a written list of any such persons, and to advise what action the Union was taking in regard to them. (R. 43-44.) Mr. Bridges replied, through the union's general counsel, that in the judgment of counsel Section 504 was unconstitutional because it violated the provisions of "at least the First and Fifth Amendments to the Constitution of the United States" and that they had so advised

Mr. Bridges; that counsel were unable to find in Section 504 either authority in the Secretary to request such information, or affirmative duty on the part of Mr. Bridges to undertake the various investigations which might be necessary to obtain such information, and had likewise so advised Mr. Bridges; and finally, that the law provided "no standards of guidance or evaluation" for the "burdensome and oppressive inquisition" which he was being called upon to undertake, and that Mr. Bridges was likewise so advised.² (R. 44-46.)

Testimony was received from Mr. Bridges that the enactment of Section 504 was a subject of discussion at many union meetings addressed by him, in which he said that "due to this law, we could no longer operate the Union as a democratic institution, operate it honestly, let the membership elect whom they chose as officers. We could no longer follow and support trade union principles, vital trade union principles which we knew from experience were vital to our existence, and that our union would be the first union attacked under this law for political purposes."³ (R.

²Subsequently, it was learned that the Department of Justice concurred in the opinion that the statute contains no provision requiring the union or its officers to report on the "communist or criminal status" of union officials and employees. (R. 156-158.)

³He was right in his prediction, for this appears to be the only prosecution thus far brought, based on Communist Party membership, since enactment of 504. It is reasonable to suppose that some of the ballots cast for respondent Brown in the union elections reflected, not an endorsement of the tenets of Communism, but what the Court of Appeals called "a determined assertion of the rights in question in face of the regulation". (R. 258; 334 F.2d 488 at 495.) The view expressed by Bridges that the statute would impair the rights of association and franchise of the union

168.) But an offer of proof, that the respondent Brown was in attendance at a meeting addressed by a union attorney, analyzing Section 504 and challenging its constitutionality, was rejected. (R. 153-156.) Likewise rejected was an offer of proof that Brown himself consulted an attorney of his choice, received legal advice that the statute was, in the attorney's opinion, unconstitutional, and that Brown acted in reliance upon that advice from counsel. (R. 159-160.) Thus, while the Government was permitted to show that respondent obtained personal knowledge of the Congressional enactment of Section 504, the defense was prevented from proving the full extent of his knowledge on the subject.

The trial court gave the case to the jury on the prosecution's theory alone, namely, that if the evidence showed respondent to have wilfully served as a member of the union executive board and the Communist Party at the same time, he was to be found guilty. (R. 237.) The defense requested instructions that would have given to the jury for its determination such issues as the presence or absence of criminal intent on respondent's part; the presence or absence of any power on his part to cause a strike or other interruption of commerce, as bearing on his intent or ability to commit punishable conduct; the presence

membership, would doubtless carry particular weight with his listeners; they had known and supported him as a person who more than once was engaged in notable instances of defending constitutionally protected rights. See *Bridges v. California* (1941), 314 U.S. 252; *Bridges v. Wixon* (1945), 326 U.S. 135; *Bridges v. United States* (1953), 346 U.S. 209; *United States v. Bridges* (1955), 133 F.S. 638 (N.D. Calif.).

or absence of evidence that he had ever attempted or counseled anything of the sort; the fact of his reliance on the advice of counsel and the appropriate consideration to be given that fact; and whether, from the evidence, the executive board on which Brown served possessed any power to call or cause any strike, as bearing on the issue of the existence or non-existence, or the clear and present danger, of any evil against which the Congress had legislated. All these requests were denied. (R. 11-18.) Given, as it was, a virtual direction to convict, the jury did so. (R. 8, 248.)

Brown was sentenced by the Court to serve a prison term of six months. (R. 8-9.)

SUMMARY OF ARGUMENT

The First Amendment protects from legislative interference the right of persons peaceably to associate with one another for lawful purposes. (*Cox v. Louisiana*, No. 24, this Term, decided January 18, 1965.) Among the associational rights thus protected are those which seek objectives of an economic nature (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* [1964], 377 U.S. 1; *Thomas v. Collins* [1945], 323 U.S. 516), as well as those that are political (*DeJonge v. Oregon* [1937], 299 U.S. 355.) Neither the fact that a person exercises a full range of associational rights with his fellow trade unionists (*Thornhill v. Alabama* [1940], 310 U.S. 88), nor his active participation in a political organization (*Yates v. United States* [1957], 354 U.S. 298) can be

per se a violation of the criminal law. No transformation of these rights occurs when they are contemporaneously exercised by an individual, and such exercise must therefore be governed by well-established standards applicable to the guarantees attending speech, press and association. Since it is the substance, not the form, with which we are concerned, no significance may properly rest upon the effort to attach to speech the label of "conduct." Respondent therefore possesses constitutionally protected rights both to serve as an officer of his trade union and to be a Communist; and the members of his union are similarly protected in their desire to elect him to serve (*Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia State Bar* [1964], 377 U.S.1.)

Section 504 of the Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525; 29 USC 504, on its face violates the constitutional command of the First Amendment by its declaration that criminality flows from the contemporaneous joint assertion of otherwise severally protected trade union and political rights. It impermissibly imposes punishment without proof that the person punished possesses either intent or ability to engage in any criminal enterprise, and it prohibits any effort on his part to establish the absence of these factors. It thus abridges rights guaranteed by the Fifth Amendment as well as by the First. (*Noto v. United States* [1961], 367 U.S. 290.)

The statute is furthermore violative of Article I, Section 9, Clause 3 of the Constitution as both a bill

of attainder (*Lovett v. United States* [1946], 328 U.S. 303; *Ex Parte Garland*, 4 Wall. [71 U.S.] [1867] 333; *Cummings v. Missouri*, 4 Wall. [71 U.S.] [1867] 277), and an *ex post facto* law (*Bowie v. City of Columbia* [1964], 378 U.S. 343; *Thompson v. Utah* [1893], 170 U.S. 343; *Calder v. Bull*, 3 Dall. [3 U.S.] [1798] 386.)

A statute which is so unprecedented in its sweep and employs the maximum form of force to require adherence to it can find support neither in reason nor authority. The Government's effort to save the statute rests in essence on two decisions only of this Court (*Board of Governors v. Agnew* [1947], 329 U.S. 441, and *American Communications Association v. Douds* [1950], 339 U.S. 382). Reliance on *Agnew* is wholly misplaced for it did not involve the exercise of First Amendment Rights nor was it a criminal prosecution. *Douds* likewise was not a criminal prosecution; and its rationale with respect to First Amendment rights has been steadily disapproved by this Court. (*Schwabe v. Board of Bar Examiner* [1957], 353 U.S. 232; *Yates v. United States* [1957], 354 U.S. 298; *Scales v. United States* [1961], 367 U.S. 203; *Aptheker v. Secretary of State* [1964], 378 U.S. 500.) Further resort to its fundamental premises would only be productive of harm to the democratic fabric of the Nation, and the case should be overruled. But in any event it cannot properly be said to support a statute which employs the threat of imprisonment in order to compel a vast number of persons into at least a partial surrender of their constitutionally pro-

tected rights, and as to some of them, to deprive them of all opportunity to hold union office despite a readiness to renounce the associations to which Congress objects.

We show that the statute at bar is so broad and indiscriminate in its reach as to be unconstitutional under the provisions of the Fifth Amendment alone (*Aptheker v. Secretary of State* [1964], 378 U.S. 500; *Shelton v. Tucker* [1960], 364 U.S. 479), and that the arguments advanced by the Government, based on the congressional prerogative and the legislative history of the statute, are without merit.

ARGUMENT

I

SECTION 504 UNCONSTITUTIONALLY RESTRICTS RESPONDENT'S FIRST AMENDMENT RIGHTS.

A. Respondent's association with the Communist Party is a protected right.

The respondent's association with others, to engage in peaceable political activity, is protected by the First Amendment against abridgement by legislative enactment. *Cox v. Louisiana*, No. 24, this Term, decided January 18, 1965; *Bates v. Little Rock* (1960), 361 U.S. 516, 523; and *DeJonge v. Oregon* (1937), 299 U.S. 353, 364.⁴ It follows that neither his membership nor his holding office in the Communist Party can be

⁴Accord: *Aptheker v. Secretary of State* (1964), 378 U.S. 500, 507; *NAACP v. Alabama ex rel. Flowers* (1964), 377 U.S. 288, 307; *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* (1964), 377 U.S. 1, 5; *Gibson v. Florida Legisla-*

made, without more, the basis for criminal punishment. *Noto v. United States* (1961), 367 U.S. 290; *Yates v. United States* (1957), 354 U.S. 298; *Herndon v. Lowry* (1937), 301 U.S. 242; cf. *Fiske v. Kansas* (1927), 274 U.S. 380 (I.W.W.) The fact that Congress has seen fit, in Section 4(f) of the Internal Security Act of 1950, 64 Stat. 987, 50 USC §§ 781 et seq., to say substantially the same thing (see *Scales v. United States* (1961), 367 U.S. 203, 207), does not dilute the constitutional vitality of respondent's right, nor transform the source of its origin. The right to think as one will, and to speak as one thinks, and to assemble with others of like mind and purpose, is one of the associational rights vouchsafed since the year 1789 to all who engage in political activity and advocacy, regardless of its content. It is a right which antedated Section 4(f); it requires no Congressional sanction; and, it may be hoped, the right will remain undisturbed as part of the fundamental liberties of the people, whatever convolutions may hereafter be taken by Section 4(f) or any other Act of Congress. As to these assertions, we do not read the Government's brief as raising any essential legal point of difference between us.

B. Respondent's service on the Executive Board of the Union is a protected right.

The respondent's association with others, to engage in the familiar variety of trade union activities, is simi-

tive Investigation Committee (1963), 372 U.S. 539, 543; *NAACP v. Button* (1963), 371 U.S. 415, 437; *Louisiana ex rel. Gremlion v. NAACP* (1961), 366 U.S. 293, 296; *NAACP v. Alabama ex rel. Patterson* (1958), 357 U.S. 449; *Thomas v. Collins* (1945), 323 U.S. 516, 539.

ilarly a right encompassed within the protected freedoms of the First Amendment. *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* (1964), 377 U.S. 1, 5; *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.* (1949), 335 U.S. 525, 531; *Thornhill v. Alabama* (1940), 310 U.S. 88, 103; *Senn v. Tile Layers Protective Union* (1937), 301 U.S. 468, 478. It follows that neither his membership nor his holding office in Local 10, ILWU, can be made, without more, the basis for criminal punishment. *Staub v. City of Baxley* (1958), 355 U.S. 313, 322, n. 5; *Thomas v. Collins* (1945),* 323 U.S. 516, 532. That Congress has seen fit to afford statutory protection to the exercise of that right (49 Stat. 449, 29 USC 151 et seq.), does not alter the fact that it is the Constitution, not Congress, whence the right springs. *Cafeteria Employees Union v. Angelos* (1943), 320 U.S. 293, 295; *Senn v. Tile Layers Protective Union* (1937), 301 U.S. 468, 478. Were the Labor Management Relations Act to be repealed in its entirety, the right to join a union and become one of its elected officers would survive that repeal, for it is a right indistinguishable from that which is exercised by all who comprise organizations of the people engaging in serious pursuits, and equally indispensable to democratic expression in the national life of a free people. As to these assertions, it would appear that the Government disagrees, for it is said that "the right to be a union officer * * * is not a constitutionally protected 'liberty'." (Govt. Br. 21.)

We are not aware of any decision of this Court which upholds such a view, and the Government cites

none.⁵ It is, indeed, a rather large assumption which the Government makes, and we think it cannot withstand scrutiny. It may be supposed that no one would any longer deny that a man must be allowed to seek and hold a job in order to support himself and his family, for this is perhaps the most fundamental exercise of those rights of liberty and property which are protected by the Fifth Amendment. (*Truax v. Raich*, [1915] 239 U.S. 33, 39; *Allgeyer v. Louisiana* [1897], 165 U.S. 578, 589; *Butchers' Union Co. v. Crescent City Co.* [1884], 111 U.S. 746, 762.) Nor, in a highly-industrialized society, can it be questioned that a labor union, whose formation is dictated by the necessity for collective pooling of their resources by working men, is but one of the numerous forms taken when people exercise the associational rights which the First Amendment guarantees. This Court has described these rights as "basic individual rights to work and to union membership." (*Aptheker v. Secretary of State* [1964], 378 U.S. 500, 512-513, n. 11.) The protected enjoyment of these rights neither permits the banning of membership in unions, nor warrants the intrusion of artificial distinctions between holding union membership and holding union office.

⁵The statement in *American Communications Association v. Douds* (1950), 339 U.S. 382, 409, that "the loss of a particular position is not the loss of life or liberty", is patently a usage of the words in their ordinary meanings. It does not warrant a contention that engaging in union associations, whether as a member or officer, is not one of the constitutional "liberties" of the people. The Government does not, however, claim that the passage quoted above sustains the position it takes here.

Either a man has full freedom of association with his fellow workmen, or he has none; either they have full freedom of association with him, or they have none. To say that a man has the constitutional right to belong to a union, so that he may not be jailed for such membership, is all that is required to be said. Membership would be meaningless if it were nominal. Who can gainsay the fact that the exercise of membership rights in a union necessarily connotes the privilege of full engagement in all its activities, including participation in its elections and the exercise of the franchise?⁶ If union membership is a constitutionally protected right, all the natural, normal and necessary attributes of that right are likewise protected. The several thousand members of Local 10 possessed a constitutionally protected right to nominate Archie Brown for office, to vote for him, to elect him, and to have him serve in that position. It is an indispensable corollary of that right that Brown should be entitled to permit his name to be placed in

⁶Of course, a union may adopt procedures for elections and impose qualifications for the holding of office, applying them equally and without discrimination. (See *Calhoon v. Harvey* [1964], 379 U.S. 134.) That Congress has now enacted, for union members, a bill of rights (73 Stat. 522, 29 U.S.C. 411), whose purpose is to encourage full and active participation by the rank and file in the affairs of the union, including its elections, reflects only a governmental intention to afford statutory protection to these rights of union members. (See *American Federation of Musicians v. Wittstein* [1964], 379 U.S. 171.) These rights, however, quite apart from statutory protection, are necessarily inherent in the mere fact of association, and find expression in the rules by which those associated together in a union provide for the democratic handling of their affairs. Note the testimony of Government witness Rohatch that Local 10 holds membership meetings twice each month, and is "a real rank and file union. We are not run by a few people, you know." (R. 69, 72.)

nomination, and to accept office upon his election to it. It would be absurd to argue that membership in a union is constitutionally protected, but various of its inseparable concomitants are not.⁷

It is not even clear from the Government's brief whether it actually concedes that mere membership in a union engaged in lawful pursuits is constitutionally protected. But this Court has held that it

"cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and in the Federal Employers Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. * * * The Brotherhood's activities fall just as clearly within the protection of the First Amendment. And the Constitution protects the associational rights of members of the union precisely as it does those of the NAACP." (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* [1964], 377 U.S. 1, 5, 8.)

We assume, therefore, that the Government will admit that union membership is entitled to constitutional protection, and that the effort will be to distinguish

⁷By a familiar line of cases, one may bring about his own disqualification from the right to hold office by being convicted of crime. Any person so affected has, of course, received a judicial trial on which the disqualification is founded. (See *DeVeau v. Braisted* [1960], 363 U.S. 144.) It is a different matter to ground disqualification upon the exercise of a First Amendment right.

between union membership and the holding of union office.

Such a distinction in the context of our times is, we submit, untenable and would produce incalculable harm. Figures readily available show that the organized labor movements of this country now embrace a total membership in excess of 15 millions. (1965 World Almanac, New York World-Telegram, N.Y., 1965, p. 759.) It should require no proof to establish that there are several hundred thousand persons engaged in the service of trade unions in capacities other than those which are merely clerical or custodial. Since it is only the latter who are excluded from the provisions of Section 504, it is plain that those affected by the Section are no mere handful.⁸ All of them are restricted in the exercise of First Amendment rights, for the statute would equally punish those who should initiate Communist allegations for the first time tomorrow, with those who are presently Communists, or those who terminated their Communist affiliations less than five years before commencing union service. Are all these persons to be regarded as so different in status from union members that they possess no claim to constitutional protection against arbitrary action by government?

⁸It was recently reported by the United States Department of Labor that there are now more than 52,000 local trade union organizations in this country. (New York Times, Feb. 8, 1965, page 9, column 1.) Not all of them, perhaps not even many, have 35-member executive boards plus six elected officers, as is the case with Local 10. (R. 68.) Even if, however, they average a total of only 10 officers, trustees, business agents, and executive board members per union, the result is that well over half a million persons are covered by Section 504.

The issue is illumined for us by a consideration of the end-product to which acceptance of the Government's position would lead. Doubtless there are those in Congress, who, intent on combatting communism, would like, if it could be done, to enact legislation that would effectively deprive Communist Party members, and especially Communist Party officers, of their First Amendment rights, and to imprison them for any attempt to exercise such rights. Efforts to achieve this result are not unknown. (Smith Act, 62 Stat. 808, 18 USC 2385; Internal Security Act of 1950, 64 Stat. 987, 50 USC § 781 et seq.) Despite the widespread recognition, of which this Court has taken note (*Dennis v. United States* [1951], 341 U.S. 494; *Scales v. United States* [1961], 367 U.S. 203), that the views expositied by Communist leaders are anathema, partly for their content and partly for their allegedly alien origin, the Constitution has stood as a bulwark against any such blanket proscription. Can it be that a lesser regard is justifiable for the rights of those who are combined in trade unions, organizations whose birth and particular development are indigenous to our soil,⁹ who contribute mightily to our national life, prosperity and achievements, and who discharge political responsibilities of the highest order?

It would be strange indeed if those who give leadership to trade unions in America were to receive, while discharging their official duties, less protection in the

⁹"Labour movements in America have arisen from peculiar American conditions, and it is by understanding these conditions that we shall be able to distinguish the movements and methods of organization from those of other countries . . ." (Commons and Associates, "History of Labour Movement in the United States", The Macmillan Company, N.Y. 1918, p. 3.)

exercise of their constitutional rights than those who merely elect such leaders—a distinction not drawn in reference to leaders and members of the Communist Party. It would be even more strange if an officer of a labor union were to be accorded less protection in the doing of his job, or to have a lesser right under the First Amendment to hold his job, than one who holds office in the Communist Party. No other conclusion is possible than that the union member who seeks office, and whose co-workers want him to serve in it, is entitled to accept it, and that he is protected under the First Amendment of the Constitution from having it claimed by government that this, and this alone, can be made a basis for criminal prosecution against him. Between this right of respondent Brown and the right of his fellow union members to choose him as an officer, no separation is possible.¹⁰ For the nature of his right is such that, were it to be infringed, that very infringement would simultaneously and unavoidably also abridge First Amendment rights of each and every member of the union. "The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel." (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar* [1964], 377 U.S. 1, 6.)

We conclude, then, that the right to hold union office carries with it at least as strong a claim to

¹⁰Seemingly, Congress was of this view, for 504 also provides, "No labor organization or officer thereof shall knowingly permit any person to assume or hold any office or paid position in violation of this subsection." The penalty may not exceed a fine of \$10,000 or imprisonment for one year, or both. (504 b.)

constitutional protection from the exercise of Congressional power as the right to be an officer of the Communist Party. Neither the one nor the other may in and of itself be denounced as a crime, or made the basis for imposing criminal penalties.

C. The contemporaneous exercise of the foregoing rights is equally protected.

We proceed to the question whether the combined exercise of these rights by respondent somehow transforms their essential character so that there emerges from that fact a piece of "conduct" upon whose occurrence Congress may fasten criminal consequences. In short, what process of alchemy takes place to bring it about that First Amendment rights, which are protected when exercised by different individuals, forfeit their claim to protection when they are simultaneously exercised by the same individual?¹¹

Essentially, the Government's argument comes down to this:

1. In the exercise of its power over interstate commerce, Congress may validly create, as it did in 9(h),^{11a} a "regulation" applicable to the holding

¹¹Actually, the statute is broader, for it punishes the holding of union office by anyone who, though not a Communist Party member, did belong to the Party at some time less than 5 years ago. We discuss this aspect of the case in a later section of our brief, noting here only that the statute applies even in the absence of contemporaneously combining union office and party membership.

^{11a}This section (29 U.S.C. 159(h)) was adopted in 1947, and its constitutionality was upheld in *American Communications Association v. Douds*, 339 U.S. 332. It did not punish or prohibit the holding of union office by a Communist Party member. It did, however, deny access to facilities of the National Labor Relations Board to any union whose officers failed to file affidavits stating they were not currently members of the Communist Party or affiliated therewith. The affidavit requirement did not apply to members of executive boards, trustees, and the like. The section was repealed in 1959, being replaced by Section 504.

of union office even though First Amendment rights of Communists are thereby abridged. (Govt. Br. 8, 13, 15-17, citing *Douds*.) Since 504 is the Congressional choice to succeed 9(h), it too must be treated as a "regulation" within the scope of approval obtained from this Court in *Douds*. (Govt. Br. 11, 36-40.)

2. Congress has power to invoke criminal sanctions in the regulation of "conduct" consisting of the contemporaneous holding of "positions" which give "rise to a conflict (or conflicts) of interest". (Govt. Br. 23, 47, citing *Board of Governors v. Agnew* [1947], 329 U.S. 441.) The simultaneous holding of union office and Communist Party membership is "conduct" which creates "conflicts of interest". (Govt. Br. 45.)

3. It follows that 504, while appearing to be criminal in form, is but a permissible way to regulate conduct that gives rise to conflicts of interest, and any impact on First Amendment rights is too incidental to evoke this Court's concern. (Govt. Br. 23.)

The trouble with this syllogism is that it claims for *Douds* determinations which that case never made, it misapplies the reasoning and holding in *Agnew*, and it distorts the English language assigning to the word "conduct" a meaning never found, so far as we can ascertain, in any decision of this Court.

(1) *Board of Governors v. Agnew* (1947), 329 U.S. 441, is not relevant.

We may quickly dispose of the contention that the doctrine of "conflict of interest" assertedly enunciated

in *Board of Governors v. Agnew* (1947), 329 U.S. 441, is relevant here; indeed, the Government's brief carefully avoids any real effort to show that it is. (Govt. Br. 23, 45.) In *Agnew*, this Court upheld legislation investing the Comptroller of the Currency with authority to compel a bank director to discontinue in that office if he also was a partner or employee in a firm primarily engaged in the business of underwriting securities. (Banking Act of 1933, 48 Stat. 162, 49 Stat. 704, 12 USCA §§ 77, 78.) It was stated that Congress could legitimately anticipate the possibility that a director might "use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take" (at 447). To eliminate "tempting opportunities" for dereliction in duty or breach of fiduciary obligation to the bank, Congress could, this Court decided, adopt "a preventive or prophylactic measure" (at 449). Enforcement of the statute required the Comptroller, in the first instance, to warn the individual to discontinue conduct claimed to be a violation of the law; upon his ignoring the warning, that fact was to be certified to the Board of Governors of the Federal Reserve System; thereupon the Board had power to notify the individual to appear at a hearing, to hold a hearing, to provide opportunity for the individual to be heard, and thereafter to order his removal from office. If, after a removal order, the individual persisted in participating in management of the bank, he then became subject to criminal prosecution.

It is at once apparent that *Agnew* is wholly inapposite here, and that the Court of Appeals rightly said that "loss of position by virtue of Communist Party membership is not to be confused with the usual conflict-of-interest situation. . . ." (R. 257; 334 F. 2d 488 at 494.) Whatever may be the extent to which protection attaches to engaging in the securities business, or to holding office in a national bank whose very existence stems from a charter granted by authority of the Congress,¹² it has never been suggested that the right to engage in either of these activities is comprehended within the provisions of the First Amendment. The "conduct" involved in serving as a bank director, while also engaging in the sale of securities, doubtless necessitates the utilization of various media of communication, but this scarcely justifies a comparison with the exercise of rights of a political nature.¹³

¹²As it is with political parties, so it is with labor unions: their formation, existence and operation, whether local or national, are not dependent on Congressional sanction. The existence of trade unions in the United States antedates the first session in 1789 of the Congress itself. An organization of cartmen in New York engaged in a strike in 1677; the bakers of New York called a strike in 1741; organization of carpenters "so that the workmen should have a fair recompense for their labour" occurred in Philadelphia in 1724; and a Central Labour Council called "The General Society of the Mechanics and Tradesmen" of New York, in which 30 trades were represented, existed in 1786. (Commons and Associates, "History of Labour in the United States", The Macmillan Company, N.Y. 1918, pp. 25, 68, 72.)

¹³In a long line of decisions (see p. 14, fn. 4) this Court has attested to "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment". (*Thomas v. Collins* [1945], 323 U.S. 516 at 530.) The constitutional protection thus guaranteed extends to "expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered". (*NAACP v. Button* [1963], 371 U.S. 415 at 444-445.)

Political expression to achieve legitimate political ends through orderly group activity is precisely what occurs when men "engage in association for the advancement of beliefs and ideas". (*NAACP v. Alabama, ex rel. Patterson* [1958], 337 U.S. 449 at 460.) Those so associated are not the less protected by the Constitution because theirs is "not a conventional political party" (*NAACP v. Button* [1963], 371 U.S. 415 at 431), or because it is "the associational rights of the members of the union" which are involved (*Brotherhood of Railroad Trainmen v. Virginia* [1964], 337 U.S. 1 at 5.) *Agnew*, then, is not a case in which First Amendment rights were argued, considered, or even thought to be present.¹⁴

It is not amiss, either, to point out that even though Congress was not dealing with First Amendment rights in the statute considered in *Agnew*, it proceeded far more cautiously with the imposition of criminal sanctions than it did in Section 504. Congress did indeed "regulate" banking there, in the manner which has become familiar in numerous fields where Congressional power is exercised—by providing for the issuance, in effect, of an order to show cause, a requirement that the person to be affected must be accorded a hearing and an opportunity to defend, and presumably a chance to persuade the hearing tribunal that no adverse order should be issued against him. Only in the event he lost at the conclusion of the administrative hearing, and only if he thereafter per-

¹⁴Neither was any contention advanced that the Fifth Amendment, or for that matter any constitutional provision, was involved.

sisted in defying the administrative order, did the statute subject him to a criminal charge. Even then, this Court agreed that he had the right to obtain judicial review (though the statute did not provide for it), and the district Court had power, by enjoining the removal order, effectively to prevent criminal prosecution for his disobedience of it. (329 U.S. at 444.) It is, then, nothing short of distortion for the Government to say, however politely it does so, that the statute in *Agnew*, "even though" the criminal aspects do not "take effect until the removal order is disobeyed", nevertheless provides "a criminal sanction against the offending individual's retention of such dual capacity just as Section 504 does * * *". (Govt. Br. 23, emphasis ours.)

In sum, *Agnew* provides not the slightest support for either of the two propositions which underlie the Government's contention here: that. (1) criminal prosecution and penalty may be founded upon. (2) the mere exercise of First Amendment rights.

(2) *American Communications Association v. Douds* (1950), 339 U.S. 382, is not controlling.

Compelled, as it is, to rest solely on *American Communications Association v. Douds* (1950), 339 U.S. 382, the Government seeks to assign to that case a holding not warranted by what the case itself states or decides. Once more there is resort, as we now show, to a misreading of this Court's opinion.

The gist of the Government's argument is that we are not dealing with a criminal statute at all, but only with a regulation. Congress, it is said, has power over

interstate commerce, and 504 is but a regulation adopted in the exercise of that power. The fact that a man may go to jail for violating the so-called regulation does not, we are told, make this a criminal case, for Congress is using imprisonment because "it merely carries into effect the purpose of the statute". (Govt. Br. 46.) A previous regulatory provision, Section 9(h), was upheld by this Court in *Douds, supra*, but inasmuch as it has been found in practice to be unsatisfactory, Congress has turned to the present statute as a substitute. (Govt. Br. 7.) We are reminded that it is for Congress, not this Court, to select the kind of regulation it desires, without limitation on its discretion. (Govt. Br. 15, 30.) We are told that Congress has exercised an informed judgment because it took "evidence" which justifies its determination. (Govt. Br. 26-27.) Section 504, then, is merely the legitimate offspring of Section 9(h). Inasmuch as this Court had previously upheld Section 9(h), why should Congress be powerless to adopt a substitute, especially when the decision to inter 9(h) was based upon reasons which were unanswerably cogent.

With the reasons assigned for repealing 9(h) we have no quarrel, for the iniquitous nature of that section is amply demonstrated by the impressive array of facts and arguments directed against it in the Government's brief. (Govt. Br. 30-36.) Most of the items recited in this melancholy catalogue of concededly "inequitable results" (Govt. Br. 40) produced by Section 9(h); could easily have been foreseen. Some of them were foreseen, along with other and

graver faults, by the one Justice remaining on this Court who participated in the consideration of that case. In the dissenting opinion of Mr. Justice Black, the affinity existing between Section 9(h) and its ancient predecessors is definitively shown, and the foul and evil consequences of such oppressive legislation are confirmed from the pages of history. Pointing out that this Court had never before "held that the Government could for any reason attain persons for their political beliefs or affiliations", the dissent exposes the insubstantiality of the contention that constitutionally protected rights may be abridged by virtue of "a satisfactory legislative reason". (339 U.S. at 449.) Evaluating the main opinion's "assurance that we need not fear too much legislative restriction of political belief or association 'while this Court sits' " (*ibid.*, 449), the dissent forewarned that "restrictions imposed on proscribed groups are seldom static" (*ibid.*, 449), and anticipated the danger of future efforts at expansion of the statute. That prediction is vindicated by the enactment of Section 504 (which substitutes imprisonment for denial of access to Labor Board facilities), and the effort to justify it here as "nothing more than another federal regulation against conduct" (Govt. Br. 23), enlarged though it be in its application from those who were said in 1950 to occupy "a position of great power over the economy of the country" (339 U.S. at 404), "have the will and power" to call political strikes "without advocacy or persuasion" (*ibid.*, 396), and "would employ [unions] to serve the political ends of a foreign power which seeks to achieve world-wide

domination" (Govt. Br. 19), to those today who possess no such power (infra, p. 41) and against whom the charge is solely "Communist Party membership, regardless of the particular member's activity or commitment", and irrespective of "active and knowing participation" in any criminal enterprise. (Govt. Br. 22.)

The plain fact of the matter is that 504 is neither a "regulation" nor does it govern "conduct." It is a criminal penalty and nothing less. It forbids the exercise of First Amendment rights as such. There is no requirement that the individual punished shall have engaged in any conduct at all. He is punished for the mere assertion of his rights, without more. It could not more clearly be a penal statute proscribing First Amendment rights than if it had been enacted as a section of the Criminal Code and given the title "Crimes, By Those Possessing First Amendment Rights, For Exercising First Amendment Rights".

Needless to say, the fact that 504 is to be found in a statute which, in other respects, imposes regulations relating to commerce, does not change the character of the section itself. Though a law "appears to be a regulation", this Court has said that

"surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning

bank robbers. The inquiry must be directed to substance". (*Trop v. Dulles* [1958], 356 U.S. 86, 95.)

And a law

"that prescribes the consequence that will befall one who fails to abide by these regulatory provisions is a penal law. Plainly, legislation prescribing imprisonment for the crime of desertion is penal in nature. If loss of citizenship is substituted for imprisonment, it cannot fairly be said that the use of this particular sanction transforms the fundamental nature of the statute." (*Trop v. Dulles, supra*, at 97.)

Thus, "labeling it a regulation" does not make it so. Section 504 is a penal statute providing for indictment, arraignment, and trial in a Court of criminal justice. No conceivable enactment could less qualify as mere regulation.

It is the same with the other "element of the offense". (Govt. Br. 47.) Speech is speech, not conduct; and speech plus speech remains speech, and labeling it conduct does not make it conduct. First Amendment freedoms are not shorn of constitutional protection because their exercise is called "solicitation". (*NAACP v. Button* [1963], 371 U.S. 415, 429-430.) This Court has said that "a statute cannot foreclose the exercise of constitutional rights by mere labels" (*ibid.*, 427.) In asserting his rights of speech, a person is not limited to abstract discussion, for "the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion" (*ibid.*, 429.) And the fact that speech, to be

effective, is exercised "in association" with others, and consists of performing services such as "the efforts of a union official to organize workers", cannot form the basis for infringement of these "privileged" rights under the First Amendment. (*NAACP v. Alabama, ex rel. Patterson* [1958], 357 U.S. 449, 460; *Thomas v. Collins* [1945], 323 U.S. 516, 530.) Of course it is true, as Texas urged, that "something more is done by a labor organizer than talking." (*Thomas v. Collins, supra*, at 526.) Of course it is true, as Virginia contended, that the NAACP not only talks, but provides a medium (organization) and a mode (resort to litigation) to enable its members to exercise their rights of expression in association with each other, and thus enhance their hopes of success. (*NAACP v. Button* [1963], 371 U.S. 415, 432.) But the fact that speech takes these active forms does not undo its claim to constitutional protection as speech, for it is not to be subsumed "under a narrow, literal conception of freedom of speech, petition or assembly." (*NAACP v. Button, supra*, at 430.) It is a right that "was enshrined in the First Amendment of the Bill of Rights" (*Sweezy v. New Hampshire* [1957], 354 U.S. 234, 250) of which we speak; a right which is "supremely precious in our society", and whose preservation requires "breathing space to survive". (*NAACP v. Button, supra*, at 433.) There is neither room nor reason for caviling.

"The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental"; those who assemble together "for lawful discussion" and "peaceable

political action * * * cannot be branded as criminals on that score"; the "legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed." (*DeJonge v. Oregon* [1937], 299 U.S. 353, 364, 365.)

If, then, as this Court has repeatedly demonstrated, it will not permit the abridgement of First Amendment rights to be accomplished by any technique of mislabeling them, what can there be in the present statute, or in the record of this case, to justify the Government in claiming that we deal here with "conduct intertwined with expression and association"? (Govt. Br. 16, 45, citing *Cox v. Louisiana*, No. 49 this Term.) In *Cox*, this Court dealt with

"a precise, narrowly drawn regulatory statute which prohibits certain specific behavior. It prohibits a particular type of conduct, namely, picketing and parading, in a few specified locations, in or near court houses".

The behavior which the statute forbade was held to be subject to regulation "even though intertwined with expression and association".

It was a statute prohibiting the picketing of a court house, of which this Court used the phrase "conduct intertwined with expression and association". What possible analogy is there between the behavior of one who leads 2000 persons to picket a court house, and the act of a man who, while holding Communist membership, participates in an orderly, private meeting of his union's executive board?

Where is the comparison? Is it perhaps Brown's mere statement, "I second the motion," that makes him a sufficiently "active" board member to transform speech into "conduct"? Doesn't it matter what the motion was that he seconded? Or what else he said at the meeting? And what he said at every later meeting? And with what purpose he served his union? If not, as the government claims, then it would require us to be deaf, dumb, and blind to the simplest facts of life to affirm that Brown's attendance at the meeting is so substantially the same as leading a group of pickets who interfere with judicial proceedings by parading near a court house, that both constitute similar "conduct" and call for an application of the same standards of constitutionality to the different statutes and situations involved.

In fairness, it must be admitted that the Government is more restrictive in defining the offense than would appear from the discussion above. The crime, it is said, was complete when he took office in the union—" * * * the offense in this case was committed when respondent combined his Communist Party membership 'with occupancy of a position of great power over the economy of the country'". (Govt. Br. 45.)¹⁵ For this reason, we are told, the case " * * * involves a restraint, primarily upon conduct, not upon speech or advocacy". (Govt. Br. 45.) Brown's

¹⁵This bland assumption is utterly at variance with the facts, else the Government would not have been so insistent on keeping from the jury evidence that neither Brown nor Local 10, nor the combination of both, possessed the slightest semblance of power over the economy. (R. 75-79.)

guilt arose from the fact that he was not deterred from "combining positions which create 'tempting opportunities' * * * to perform acts inconsistent with the national labor policy. At most, it is a regulation of 'conduct' * * * intertwined with expression and association' * * * and thus distinguishable from regulations of speech as such". (Govt. Br. 45.)

But so devoid of reason is this contention that minute one seeks to elaborate a rational explanation for it, all internal consistency vanishes. This is why the Government finds itself slipping into a discussion of quite a different kind of "conduct" when it puts forward the factual bases which are said to entitle the statute to be judged, not by speech standards, but by the lesser standards relating to "conduct". Thus we find the Government saying that the statute's "primary concern is conduct—serving in union offices—which, if committed by individuals responsive to the directions of a foreign-dominated power, presents a grave threat to our national economy". (Govt. Br. 8.) The whole thrust of the argument based upon the legislative history is that the concern of Congress is with preventing the calling of political strikes. (Govt. Br. 11, 15.) "In other words, Section 504 is a prophylactic measure directed at preventing future conduct, not at punishing past speech or deterring prospective association". (Govt. Br. 16.)

It would appear, then, that there is no apprehension that the mere election of Brown to union office, and his commencement of service on the executive board, might be taken as a signal for an armed up-

rising, or for his fellow workmen to plunge the San Francisco waterfront into political strife. The "conduct" which Congress is said to fear, against which the legislation is essentially directed, is something additional to and different from Brown's election to office; it is not of the present tense, but of the future; it is not something happening now, but something that possibly may occur at some indefinite and unforeseen future date—and, of course, may never occur at all. It is the mere possibility of its occurrence which Congress, we are told, had the right to evaluate and which justifies the enactment of 504. And this Court is assured that the standards by which Brown is to be judged are "objective and readily-determined criteria". (Govt. Br. 47.) That the acceptance of this proposition means that it would never be possible for Brown to prove his innocence of either culpable conduct or intention to do anything warranting imprisonment, is to the Government of no slightest consequence.

It would be reasonable to expect that a statute so utterly unprecedented as 504 would result, in any effort to justify it, in a patently strained interpretation of any decision of this Court which is said to support it. This is precisely what the Government has found it necessary to do with the decision in *Doubs* in order to make it appear that 504 is within the scope of approval given to 9(h). A careful examination of the Court's opinion reveals that the very reasons assigned to justify 9(h) are themselves inconsistent with the position which is taken to support 504. These may be summarized as follows:

(1) Important to the holding in *Douds* was that 9(h) did not "specifically forbid persons who had not signed the affidavit from holding positions of union leadership nor require their discharge from office". (339 U.S. at 390.) Here, of course, the prohibition against the holding of union office is absolute and unqualified.

(2) To the extent that First Amendment rights were invaded by 9(h), it was said that the statute resulted only "in an indirect, conditional, partial abridgement of speech" (at 399). Here, the abridgement is direct; it applies unconditionally; it is complete, not partial.

(3) *Douds* expressly attached the greatest importance to the fact that 9(h) "does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief" (at 402). Here, affiliation with the Communist Party is expressly made "one element of the offense" (Govt. Br. 47), and despite the tortured effort to make 504 out as something different from a criminal statute (Govt. Br. 44-45), it cannot be regarded as anything else.

(4) Heavy stress was laid in *Douds* on the fact that 9(h)

"touches only a relative handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint. And it leaves those few who are affected free to maintain their affiliations and beliefs subject only to possible loss of positions * * *"
(at 404).

Here, however, the loss is not "possible", but commanded, and those affected, as we have shown, are not merely a relative handful of persons, but all who belong to the Party. Moreover, the very reason for justifying the lesser restraint exerted by 9(h) on even the "handful", was based in *Doubs* on their supposed occupancy of positions of great power over the economy—an argument which cannot feasibly be advanced here.

(5) To meet the argument asserted in the dissenting opinion that 9(h) was a forbidden bill of attainder, the distinction drawn in *Doubs* was said to be " * * * emphasized by the fact that members of those groups identified in 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in 9(h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result [citations]. Here the intention is to forestall future dangerous acts: there is no one who may not by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit." (at 414.)

The passage above quoted needs no analysis to demonstrate that its underlying premises are inconsistent with the position which the Government must needs take here.

Though we argue later that *Douds* should be expressly overruled, the foregoing analysis makes plain that the Court of Appeals was right; that *Douds* is not controlling here, and does not support, let alone require, the affirmance of respondent's criminal conviction.

II

SECTION 504 ON ITS FACE AND AS APPLIED HERE DEPRIVES RESPONDENT OF LIBERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE COMMAND OF THE FIFTH AMENDMENT.

A. Ignored are all factors of intent or ability to bring about an evil.

We have urged that the question of Brown's guilt cannot, consistent with applicable constitutional provisions, be decided on a record which excludes evidence of his purpose in accepting union office, evidence of his conduct therein, evidence of the reasonable possibility that he or the local board or the combination of both of them possessed power to cause injury to commerce, and evidence of his own intent. In no other way can it be determined whether Brown, who suffers personally the consequences of a guilty verdict, has in fact done anything to merit punishment.

Nothing better illustrates the tenuous basis upon which the statute rests, and the nebulous character of the Government's defense of it, than a comparison between the known facts here and the suppositions upon which the Government's case must

rest. No claim is made that Brown, or the union on whose board he served, has ever interfered, or advocated interfering, with our channels of commerce at any time during the past 15 years. It was, in fact, the Government that objected to any proofs being received by the jury on this subject, for these proofs would have fully demonstrated that this union, its members and its officers, Brown among them, had established a record of such harmonious relations with employers in the solution of economic problems that both City and State paid them honor for it. (Def. Ex. D; R. 111, 194; Def. Ex. E; R. 112, 195.) This evidence, which was kept from the jury, is supposed also to be ignored by this Court, while in its place the Government sets out a list of references to what other persons and other unions are said to have done at other times and places in the past. (Govt. Br. 24-27.) There is even a certain degree of temerity to be found in the reproduction for this Court's consideration of hearsay references taken from so-called reports compiled by the publicity department of the CIO in 1954, relating to the expulsion of this union in 1949 from the CIO. (Govt. Br. 27-28.)¹⁶

But conviction for crime is conviction for personal misconduct, and under our system of law it cannot

¹⁶More apropos would have been a reference to *International Longshoremen's and Warehousemen's Union (American Mail Line Ltd.)* (1963), 144 NLRB 1432, 1442, where it was said that the "concord between respondents and Pacific Maritime Association has been widely acclaimed as a history-making precedent, a peaceful settlement of a problem which has troubled the west coast waterfront for a number of years."

be otherwise. The Smith Act (54 Stat. 670, 18 USC 2385), was saved from constitutional condemnation only because this Court was able to construe it as requiring

“as an essential element of the crime proof of intent of those who are charged with its violation to overthrow the Government by force and violence.” (*Dennis v. United States* [1951], 341 U.S. 494, 499).

See also *Scales v. United States* (1961), 367 U.S. 203, 226-227. And in *Yates v. United States* (1957), 354 U.S. 298, it was held that this “requisite specific intent” could not be deemed proved by a showing of “mere membership or the holding of office in the Party” (354 U.S. at 331). See also *Noto v. United States* (1961), 367 U.S. 290, 297-298.

Accordingly it is clear that seeking to attach personal criminality to mere political associations or membership in political organizations must fail; proof of the defendant's personal intent to bring about a substantive evil is an indispensable requisite of conviction. Arguing, as it does, that 504 neither requires nor permits proof that the accused intends, or has ability, to commit any act designed to achieve the forbidden object of causing political strikes (Govt. Br. 15-16, 22, 46), the Government cannot but concede that if the aforementioned decisions of this Court are applicable here, Section 504 must be declared to be, as the Court of Appeals declared it to be, unconstitutional on its face. Compare *Aptheker v. Secretary of State* (1964), 378 U.S. 500.

B. An irrebuttable presumption of guilt is drawn from the exercise of a constitutionally protected right.

But more basically, what emerges from an analysis of the Government's position here is that Congress need not really be interested in whether the respondent Brown, or the union of which he was a board member, or the combination of both, ever in fact constituted a threat to the country or to interstate commerce, or have given reason to suppose that they might at a future date. All that is needed, in the view of the Government, is that Congress shall have established what amounts to a conclusive presumption against the respondent by virtue of his political affiliations. The result of such a procedure is to transfer the criminal trial against Brown to the halls of Congress, to try him in absentia, upon evidence wholly unrelated to him, and then to adopt a law enabling the Government to prosecute him in San Francisco, with what amounts to a built-in verdict of guilty written into the statute itself; in effect, due process in reverse.¹⁷

Even in cases where the force exerted by Government against the individual is not penal in the crimi-

¹⁷ "Let the jury consider their verdict," the King said, for about the twentieth time that day.

"No, no!" said the Queen. "Sentence first—verdict afterwards."

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

"Hold your tongue!" said the Queen, turning purple.

"I won't!" said Alice.

"Off with her head!" the Queen shouted at the top of her voice."

(Lewis Carroll, "Alice In Wonderland", Peter Pauper Press, Mount Vernon, pp. 157-158.)

nal sense, but rather takes the form of imposing a civil disability, this Court has not permitted Congress to avoid constitutional restraints by such arguments as are advanced here. In this Court's decision in *Aptheker v. Secretary of State* (1964), 378 U.S. 500, that portion of the Subversive Activities Control Act which prohibits the issuance of passports to Communists was held invalid because it established "an irrebuttable presumption that individuals who are members of the subversive organizations will, if given passports, engage in activities inimical to the security of the United States". (378 U.S. at 511.) Though it was dealing with a non-criminal case, this Court directed attention to views expressed to Congress in 1950 by the Assistant to the Attorney General of the United States, Peyton Ford, whose opposition to a bill then being considered was stated in these terms:

"A world of difference exists from the standpoint of sound policy and constitutional validity between making * * * membership in an organization * * * a felony and recognizing such membership * * * as merely one piece of evidence pointing to possible disloyalty. The bill would brand the member of an illicit organization a felon, no matter how innocent his membership * * *. It does not appear, therefore, necessary even if constitutionally possible to add * * * a penal statute such as proposed in the bill * * * [I]t is the duty of the Attorney General to protect the rights of individuals guaranteed by the Constitution as well as to protect the government from subversion." (Hearings on HR 3903 and HR 7595 before the House Committee on Un-

American Activities, 81st Cong. 2nd Session, 2125.)

This Court recently held, in construing legislation relating to the illegal operation of a still, that "unexplained presence at the site of the criminal enterprise" could provide a reasonable basis for inferring guilt of the substantive offense. (*United States v. Gainey*, this Term, No. 13, decided March 1, 1965.) In reply to strong dissents attacking the legislation for invading guarantees of the Fifth and Sixth Amendments, the Court relied upon the fact that

"the statutory inference was not conclusive. 'Presence' was one circumstance to be considered among many. Even if they found that the defendant had been present at the still, and that his presence remained unexplained, the jury could nevertheless acquit him if they found that the Government had not proved his guilt beyond a reasonable doubt".

But in our case, the effect of the statute is to enforce a presumption that is conclusive; opportunity to the defendant to "explain his presence" at the meeting of the board is not afforded, and the jury is not allowed to hear any explanation which might lead to acquittal, nor is it told that he may be acquitted even in the absence of such explanation. The statute is drawn to brook no explanation and to allow no acquittal. Thus the Government contends here for a rule denying, to a person exercising First Amendment rights, those basic safeguards which this Court would not deny to one charged with the illicit operation of a still.

III

SECTION 504 "SWEEPS TOO WIDELY AND INDISCRIMINATELY ACROSS LIBERTIES GUARANTEED" BY THE FIRST AMENDMENT. (APTHEKER v. UNITED STATES [1964], 378 U.S. 500.)

Our discussion thus far has demonstrated the numerous respects in which the statute offends the provisions of the First Amendment. Many of the impermissible inroads made upon the respondent's rights of speech, press and association also effect substantial abridgements of rights guaranteed to him by the Fifth Amendment. We have shown that guilt is imputed and punishment is imposed despite the absence of criminal intent, or of any ability, on the part of respondent to bring about any substantive evil; and that the operation of the statute is such that his guilt is essentially presumed from so-called evidence never adduced at any trial at which he has an opportunity to meet it. Yet even these fundamental defects of the statute do not, as we now show, exhaust the aspects in which it is constitutionally vulnerable.

The statute suffers from the vice that, in order to insure against the calling of political strikes, it not only sweeps within its ambit hundreds of thousands of trade unionists,¹⁸ but it does so by means "that particularly stifle personal liberties when the [same] end can be more narrowly achieved". (*Shelton v. Tucker* [1960], 364 U.S. 479, 488.) Such overbreadth, especially in statutes trenching upon First Amendment freedoms, has occasioned pointed comment from this Court in the recent past. (*Aptheker v. Secretary of*

¹⁸See page 20, fn. 8, *supra*.

State [1964], 378 U.S. 500, 516; *NAAACP v. Button* [1963], 371 U.S. 415, 432-433. See also *Cantwell v. Connecticut* [1940], 310 U.S. 306, 310; *Carlson v. California* [1940], 310 U.S. 196, 112.)

Assuming that Congress' power to regulate interstate commerce can be said to permit some control over the exercise by trade union members of their associational rights, it can scarcely be denied that methods less drastic than 504 are available. A statute more narrowly drawn could make political strikes (as Congress has made jurisdictional or secondary boycott strikes [61 Stat. 140, 29 USCA 158(b)(4)(B) and (D)] unfair labor practices, or subject such strikes to injunction proceedings as Congress has done in connection with "national emergency" strikes [61 Stat. 155, 29 USCA 178]).

Congress has also known how to attack the "problem" of Communists in trade unions by legislation which more carefully focuses on the "evil" than does Section 504. Thus a labor organization which is found after a hearing to be "communist infiltrated" is deprived of its right to function as such under the National Labor Relations Act (Communist Control Act of 1954, 68 Stat. 775, 778, 50 USC 792[g] et seq.) and members of "Communist organizations" are denied the right to hold office in or be employed by a trade union. (*ibid.*, 68 Stat. at 777, 50 USC 784[a][1][E].) Indeed, Congress has precluded the members of an organization which has been found to be a "Communist action" organization, from employment in "defense" facilities. (*ibid.*, 50 USC 784 [a][1][D].) Whatever

may be said of the constitutionality of these provisions on other grounds, it is clear that this legislation is not subject to the charge, applicable here, that Congress has acted in utter disregard of the existence of alternative and far less drastic means to achieve its purpose. The destruction of First Amendment rights which follows from the imposition of a criminal penalty for the mere temporal conjunction of local executive board service with Communist Party membership, would be a costly price to pay merely to achieve a result which the Government itself claims could be reached through the use of lesser coercions (Govt. Br. p. 44).

The statute is not saved from the charge of overbreadth merely because it names "members of the Communist Party itself" as those covered, rather than members of "a Communist-action group" (Govt. Br. 21), and the effort of the Government to distinguish on that ground the decision of this Court in *Aptheker v. Secretary of State* (1964), 378 U.S. 500 lacks force. It is true that the technique customarily employed in legislation by which Congress seeks to restrict Communists, is to describe the persons to be affected as "members of an organization", of which a particular characteristic is stated, i.e. an organization that "advocates the overthrow of the government by force and violence" (Smith Act, 54 Stat. 670, 18 USC 2385), or one concerning which "there is in effect a final order of the Board requiring such organization to register" (Subversive Activities Control Act of 1950, 64 Stat. 987, 50 USC 781 et seq.). But the de-

cision of Congress to employ in 504 the technique of specifying members of the Communist Party as such, does not make this a narrowly-drawn statute "more discriminately tailored to the constitutional liberties of individuals" (Govt. Br. 21), since, contrary to the Government's argument, no "major differences of scope" (Govt. Br. 21) were intended or created. The different technique used here serves only to abbreviate the definition of the class of persons against whom all this legislation is directed, and that class remains, as it was intended to remain, precisely the same. The Government's brief, with its repeated emphasis on the purpose of Congress to exclude from union office all "adherents to the Communist Party and believers in the unconstitutional overthrow of our government" (Govt. Br. 14), scarcely lends support to the effort to differentiate between the body of persons affected by 504 and those whom Congress sought to reach, in other contexts, by legislation employing the alternative method of describing them.

Neither is there any merit to the effort to distinguish *Aptheker* upon the ground that there the right prohibited was a constitutionally protected "liberty", whereas here there is none. We have shown in our earlier discussion that the right to serve in a union office to which one is elected cannot rationally be treated as separable from what this Court has called "basic individual rights to work and to union membership" (*Aptheker v. Secretary of State*, *supra*, at 573, n. 11). It is an integral concomitant of the membership's "right to select a spokesman from their

number". (*Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377, US 1, 6.) To the extent that any difference exists between the rights of Brown and his fellow unionists to have him act in a representative capacity for them, and the right of Aptheker to travel in Europe and Asia, it would seem self-evident that in foreclosing the former, 504 is less "discriminately tailored to the constitutional liberties of individuals" than the passport restrictions considered in *Aptheker*, and its effect, on larger numbers of people, is more devastating.

Additionally, there is a vast difference between the methods employed in the two statutes to achieve the Congressional purpose. Here, it is at once made a criminal offense for Brown to occupy union office, without opportunity to exculpate himself from the suspicion or fear that he might commit some intolerable abuse of the privileges of occupying that office. In *Aptheker*, the statute not only did not impose criminal punishment ab initio, but it afforded the passport applicant a full administrative hearing in which to support his rights by producing relevant evidence personal to him. The Government's argument that, notwithstanding, 504 is defensible because "there is no similar administrative process whereby candidates for union office are evaluated and their qualifications approved" (Govt. Br. 22), is not an argument for upholding 504. It is at most only an argument that Congress could and should resort to similar administrative process with respect to union officers. Certainly the argument does not justify approval of this

statute which requires that Brown shall surrender one constitutionally protected right in order to enjoy another. A similar contention was also advanced in *Aptheker*, and this Court said,

"Since freedom of association is itself guaranteed in the First Amendment, restrictions imposed upon the right to travel cannot be dismissed by asserting that the right to travel could be fully exercised if the individual would first yield up his membership in a given association". (378 US at 507:)

IV

SECTION 504 IS BOTH A BILL OF ATTAINDER AND AN EX POST FACTO LAW.

The Government, in effect, asks this Court to disregard the retrospective features of Section 504, saying that different questions would be presented, "of course", in a case involving a person whose resignation from the Party had occurred within 5 years of election to union office. (Govt. Br. 11, n. 2.) But we think there are strong grounds for a different view. In the first place, no reason is offered to justify a departure in this case from the Court's long established practice.

"... in appraising a statute's inhibitory effect upon such [First Amendment] rights, ... to take into account possible applications of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama*, 310 US 88, 97, 98; *Winters v. New York*, *supra* (333 US at 518-520)." (*NAACP v. Button* [1963], 371 U.S. 415, 432.)

Clearly, the inhibitory impact of this statute upon the thousands of trade union officers to whom it applies ought not to be ignored.

In the second place, the retrospective sweep of the statute reaches even to this respondent. At no time between 1959, when the statute was enacted, and 1964 when the five-year period could have expired at its earliest, could Brown, by any "voluntary alteration of [his] loyalties" (*American Communications Association v. Douds* [1950], 339 U.S. 382, 414) or otherwise, have held union office without liability to criminal prosecution. Nor could he even now by such an alteration become eligible to hold union office for five more years.

Apart from the fact, as we later show, that nothing in the legislative history cited by the Government supports the arbitrary selection of a five-year period, the conditioning of the exercise of constitutional rights upon past behavior renders this statute invalid as an *ex post facto* law prohibited by Article I, Section 9, Clause 3 of the Federal Constitution. No more than could the minister in *Cummings v. Missouri* (1867), 4 Wall (71 U.S.) 277, or the lawyer in *Ex parte Garland* (1867) 4 Wall (71 U.S.) 333, or the government employee in *Lovett v. United States* (1946), 328 U.S. 303, change their "past" to comply with the statutes involved in their cases, can respondent change his to comply with 504. As to respondent and to others who are or may be similarly situated, the statute became upon its enactment and still remains *ex post facto* in its operation. It creates

a crime "one element" of which was conduct that was lawful before the statute was enacted. It establishes a five-year period during which persons are not allowed to comply with the law solely by virtue of the very fact (Communist Party membership) which, until the passage of the statute, was itself not criminal.

Moreover, that which has newly become an element of a criminal offense is not an act committed by Brown, but his past association with others. This fact, alone is used to identify him as a person to whom the new statute applies. Thus, its impact on Brown is made to depend solely on the taint which Congress has placed on an entire group, from whom Brown, through having been a member of the group, derives the infection. (*Thompson v. Utah* [1893], 170 U.S. 343; *Calder v. Bull*, 3 Dall. 3 U.S. [1798] 386; *Bowie v. City of Columbia* [1964], 378 U.S. 343.)

It appears to us that even the decision in *Douds*, on which the Government relies so heavily, affords no basis upon which the statute may be construed so as to prevent it from offending the prohibition against *ex post facto* laws and bills of attainder.

V

THE ARGUMENTS ADVANCED BY THE GOVERNMENT, BASED ON CONGRESSIONAL PREROGATIVE AND THE LEGISLATIVE HISTORY OF SECTION 504, ARE WITHOUT MERIT.

The Court of Appeals, distinguishing between a criminal statute and a law which provides for ad-

ministrative regulation, is for that reason taken to task as basing its decision on a ground characterized as "insubstantial". (Govt. Br. 43.) The Government's argument is that Congress could, if it chose, have substituted injunctive proceedings in place of 9(h) rather than criminal prosecution, with equally inhibiting effects against Communists; for then a person in the position of respondent Brown "could be enjoined and, if he were to disobey the injunction, criminal contempt proceedings might ensue. The prohibition would be equally absolute, and the 'discouragement' for all but secret Communist Party members would be as effective as any criminal penalty". (Govt. Br. 44.) From this it is said to follow that "the criminal nature of the sanction does not really exert more 'force' than if the remedy were civil", and hence it is immaterial whether Congress chooses the administrative procedure laid down by 9(h), or a procedure to obtain injunctions, or criminal prosecution as provided in 504. (Govt. Br. 44-45.)¹⁹

It is, to say the least, a refreshingly novel argument which the Government here advances. For what it amounts to, is that because Congress could allegedly empower the Secretary of Labor to obtain a court order to compel respondent to stay away from executive board meetings of his union, respondent cannot complain if Congress has instead chosen to accomplish the same result by clapping him into jail. This conclusion emanates from over-focusing attention

¹⁹The availability to Congress of less drastic measures than imposing criminal punishment is treated in an earlier section of our brief.

upon the "problem" which confronted Congress (Govt. Br. 14), to the exclusion of any concern for the rights of the individual. Once it is granted that the "problem" was a real and substantial one, and that concern with its solution is of overriding significance, how can anyone fairly challenge the determination of Congress to exercise virtually unlimited power in meeting it, even though the rights of the individual must be impaired as a result of the Congressional action? Of course, given such an assumed major premise, the conclusion follows quite logically. Rights which this Court has many times characterized as among the most precious possessed by any human being, get shunted aside.

It is worthwhile to ponder for a moment the precise process by which the foregoing conclusion is reached. Congress, it is said, is entitled to take this kind of action because it heard evidence that Communists "may call political strikes" (Govt. Br. 15); they perjure themselves (Govt. Br. 32); they file with the Government statements under oath containing lies (Govt. Br. 34); they are "responsive to the directions of a foreign-dominated power" (Govt. Br. 8); their "allegiance is to a cause which seeks the overthrow of the government by force and violence." (Govt. Br. p. 8.) This evidence is not the product of contested judicial proceedings, but of mere one-sided investigation. Utterly disregarded are the observations made in specific cases decided by this Court that Communists "carry on legitimate activities" (*American Communications Assn. v. Douds* [1950], 339 U.S. 382,

393); that, assuming illegal aims or activities of some members of the Party, "it cannot automatically be inferred that all members shared their evil purposes or participated in their illegal conduct" (*Schwabe v. Board of Bar Examiners* [1957], 353 U.S. 232, 246); that "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted beliefs" (*Schneiderman v. United States* [1942], 320 U.S. 118, 136; that "it is difficult to perceive how the requisite specific intent to accomplish such overthrow could be deemed proved by a showing of mere membership or the holding of office in the Communist Party" (*Yates v. United States* [1957], 354 U.S. 298, 331); that a person may not be punished "for his adherence to lawful and constitutionally protected purposes because of other and unprotected purposes which he does not necessarily share" (*Noto v. United States* [1961], 367 U.S. 292, 299-300); that Congress may not ignore "plainly relevant considerations such as the individual's knowledge, activity, commitment and purposes" (*Aptheker v. Secretary of State* [1964], 378 U.S. 500, 514); and that the justification for punishing an individual requires evidence that "must be sufficiently substantial to satisfy the concept of personal guilt * * *" (*Scales v. United States* [1961], 367 U.S. 203, 224-225). It will not do to substitute in a criminal case the suppositions underlying a Congressional conclusion, for the hard facts upon which a jury must act. The edifice created by the Founding Fathers prevents it. When a man is prosecuted in a criminal trial, the rules of the game must correspond to the

stakes that are involved, and they require strict adherence to the highest constitutional standards—adherence to “rigorous standards of proof.” (*Noto v. United States* [1961], 367 U.S. 290, 291). This Court has said in words that cannot possibly be mistaken,

“It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party.” (*Noto v. United States, supra*, at 299.)

Evidently this not only needed saying; it needs to be said again.

If the Government is right in its position here, it would be just as sensible for Congress to choose any other “prophylactic measure directed at preventing future conduct” that it might seize upon. For it will be recalled that the Government’s contention is that the discretion of Congress in this regard is unlimited in areas where conduct is regulated. (Govt. Br. pp. 15, 30.) Congress could then just as lawfully decide not to wait for Brown to be elected to office, but to eliminate the threat which his mere presence at a union membership meeting might present of contaminating his fellow members, and amend Section 504 so that it would punish him for membership in the union. It could just as logically disregard union membership, since the locus of a strike is the industry itself, and accordingly Congress could, with an addi-

tional slight amendment of Section 504, make it a crime for Brown to hold a job in the longshore industry. None of this is fanciful, since the thing that is legislated against is not conduct at all, but only the hypothetical chance that a particular person may engage in harmful conduct because someone else in his political party is said to have done so or attempted to do so at some other time and place. Of course, nothing would be simpler than to write a law punishing conduct, even quelling conduct at its first manifestation, for the Government is equipped with multiple processes by which strikes may be enjoined immediately they are commenced, or in fact intercepted in advance of their start. (See p. 47, *supra*.) With the mask taken off then, the statute stands revealed for what it is: an expression of such animosity toward Communism that it has led Congress to proceed in ways to which both reason and fact are strangers.

In still another respect, there would be no limit upon the uses to which Congress might employ the same device of fact-finding. In its duty to protect the purity of federal elections, Congress could prohibit participation of Communists therein, at least as candidates and perhaps as voters, upon the ground of their asserted interest in destroying our form of government. Congress could likewise utilize the same alleged predispositions and allegiances of members of the Communist Party to connect Party membership with an unlimited number of factual situations, and thereby make it criminal for Communists to seek even

to earn wages in any industry to which federal interest extends; with the growth of centralization everywhere evident, scarcely any pursuit would remain upon which Congress could not exert its force. The logical culmination of all such efforts would be for Congress, upon the basis of the alleged predilection of Party members to lie under oath, to enact legislation barring them from resort to the federal courts, whether as litigants or witnesses, in the interests of safeguarding the due administration of justice. If nothing else, this would be an effective means of expediting federal trials, particularly in those instances where the defendant happened to be a Communist, since his testimony would not be admissible at all; and by a related inference, neither might the testimony of those who were ready to come forward to give evidence in his defense.

Still a third avenue of oppression would be opened up. As the Court of Appeals correctly said, the power given by 504 is "not simply to remove the threat, but to punish it; and with no showing whatsoever that the act in fact is threatened by the person punished." (R. 259; 334 F2 at 495.) Arguing from its premise that Congress was merely adopting a "prophylactic measure directed at preventing future conduct" (Govt. Br. 16), the Government defends the logical application of the statute to persons "regardless of the particular member's activity or commitment" (Govt. Br. 22), saying Congress may draw its net more broadly to bring within the scope of the statute all those "who, according to objective and readily

determined criteria, are likely to present the danger." (Govt. Br. 47.) In short, we are led by one step to another, from punishing the holding of union office by a Communist to punishing virtually anything else, and from first applying punishment to those who intend and are able to produce harm, to those who concededly are not "committed" Communists; and all on the strength of Congressional "findings" and "prophylactic" regulations. It is small wonder that this Court has warned:

"Broad prophylactic rules in the area of free expression are suspect." (*NAACP v. Button* [1963] 371 U.S. 415, 438.)

It is urged that labor unions have come to "occupy a unique position under this country's national labor policy, and their activities are subject to a full network of federal regulation which includes restrictions on the eligibility of candidates for union office (other than the one involved in this case) and the manner in which elections and other ballots are to be held. * * * It is certainly appropriate therefore, for Congress to protect these vessels of national economic policy against possible misuse * * *." (Govt. Br. 18-19.) The argument evinces a surprising degree of confusion concerning the subject matter. Apart from the fact, as our Statement shows, that the method in use in Local 10 for the nomination and election of officers is a model of excellence and integrity, which was fashioned by the membership several decades before Congress undertook to insure the purity of union elections, no more can be said of this kind of

federal regulation than that it is designed to protect, not eliminate, the right of union members to select their officers, and to strengthen, not destroy, guarantees for democratic participation of union members in their elections. The Government ignores the underlying question, which is: who is being protected against whom, and from what? In the "full network of federal regulation" to which Congress has now resorted, the purpose is manifestly to prevent a union from abusing the rights of its members, not to enable government to inflict abuse both on the union and its members under the claim that government may "protect."

Still more startling is the suggestion that the Congressional right to "protect" is justified by the fact that unions have become "vessels of national economic policy." We know it to be true that in the fascist state over which Mussolini ruled, labor unions were indeed "vessels of national economic policy" (Mussolini, *Fascism*, Ardita Publishers, Rome, 1935 at pp. 11, 46), and it would seem that unions occupy a like role in the Soviet Union (Vishinsky, *The Law of the Soviet State*, Macmillan Co., N.Y. 1948, at p. 622 et seq.); but it is news to us that the same concept of a servile trade union movement has now become part of the political system prevalent in the United States. We had always supposed that the relationship between unions and government was exactly opposite to that which is here asserted. When was it that there was overruled this Court's unanimous decision recognizing the imperative need "to preserve inviolate

the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means"? (*DeJonge v. Oregon* [1937], 299 U.S. 353, 365.)

It is said that 504 is "deeply rooted in reason and in sound policy judgments." (Govt. Br. 40.) But in the Government's discussion of the legislative history of the section, we are unable to find anything which justifies that statement. It may be supposed that the Government's brief presents the strongest product obtainable from an assiduous culling of the records of relevant legislative proceedings occurring prior to enactment of 504. Yet the Court is referred to nothing which indicates that Congress gave serious, or any, consideration to whether injunctive or administrative process might achieve its object quite as effectively as the resort to criminal prosecution. Nothing emerges from the hearings held by Congress to support the withdrawal of the permission allowed by 9(h) to discontinue Communist affiliations, and the substitution of a provision which, as we have shown, plainly offends the prohibition against *ex post facto* legislation and bills of attainder.

Neither are we referred to any evidence received by the Congress which clothes it with an expertise, thought to be not possessed by this Court, to determine the length of time that is reasonably necessary to enable a person to rid himself of the taint acquired

from political associations. If, in the absence of supporting evidence, or of experience with facts so commonly known that notice of them may be judicially taken, Congress can be said to have made a determination "rooted in reason and in sound policy judgments" in establishing a 5-year period of renunciation and penance before the ingrained characteristic of "threat" to our economy is dissipated, then it is equally valid to say that Congress may fix the time at 10 years, or 20, or perhaps 50. And since this is an area in which it is said that Congress has the "prerogative" of choosing the means, and that this choice is "entirely within Congress' discretion" (Govt. Br. 15, 30), this Court would be foreclosed from exercising the judicial power with which it is invested to invalidate a statute so patently irrational as to border on the irresponsible. Far from evincing that Congress was pursuing a course reasonably related to reaching a judgment "rooted in reason and in sound policy judgments," the legislative history would appear to be an effort to substitute decision by the exercise of legislative authority over matters which are reserved by the Constitution to resolution by the judicial process.

We submit that the arguments advanced by the Government which are said to be based on the legislative history of 504, and such evidence as has been elicited in support of those arguments, make out no case for the validity of that section. It follows that this Court is not required to attribute to the investigations which preceded the enactment of 504 a weight

to which the history of the section cannot properly lay claim. Particularly is this true in the case of a law affecting First Amendment rights.

"In the area of First Amendment freedoms as well as areas involving other constitutionally protected rights, 'we cannot avoid our responsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."'" (*Cox v. Louisiana*, No. 24 this Term, fn. 8.)

When the fact finding process is distorted, even though its source is Congressional rather than state action, the same rule is to be applied in protecting First Amendment rights. (See *United States v. Carolene Products Company* [1938], 304 U.S. 144, 152, n. 4).

CONCLUSION

It has been shown, we submit, that 504 offends provisions of the Constitution in ways and to a degree that place the statute beyond any possibility of redemption. This in itself, if we are right, would warrant affirmance of the decision of the Court of Appeals, which ordered not only that the conviction under which Brown was sentenced be reversed, but held that the indictment be dismissed. We cannot believe that any result short of outright condemnation of the

statute would be consistent with frequently-expressed views of this Court by which guidance and clarity have been supplied to a full and accurate understanding of the purport of the Constitution's formidable obstacles to any whittling-down of the rights of the people.

But a decision which, though disposing of the immediate issues presented here by holding 504 unconstitutional on its face, did not lay at rest relevant questions of sizeable dimension because the foundations of decision were to be confined to more narrow compass than need be, would leave for tomorrow guidance that should be provided today. The Government strenuously urges that *Douds* is controlling here. Though we think our brief plainly proves that the Government is in error, it cannot be disputed that a requisite of decision in this case must be a critical examination of *Douds*; and inasmuch as review is necessary, the fact that it is possible, as we have shown, to distinguish it on substantial grounds does not dictate the choice of that course for this Court. The Court of Appeals was manifestly bound by this Court's decision, hence its reading of *Douds*, together with a careful adherence to this Court's other decisions dealing with Communist Party membership, could properly lead it to no more than the conclusion which it reached, upon the distinction which it drew. No such limitation, however, prevents this Court from resting disposition of the case upon broader and more meaningful grounds. The fact that 9(h) has been repealed would seem to argue, not that the reasoning

of *Doude* concerning it should remain untouched, but rather that the circumstances for reconsideration of its rationale are more favorable. For one thing, no existing administrative procedures would be unsettled by a decision of this Court flatly disapproving *Doude*.

We are told in the Government's brief that 9(h) was essentially a serious and substantial mistake, for experience "demonstrated that there were significant flaws" in it, that "many * * * inequities and administrative difficulties * * * emerged during the twelve years of its enforcement," that it was filled with "shortcomings and inequities", and that it * * * proved to be "a circuitous and unworkable procedure which produced inequitable results." (Govt. Br. 9, 11, 36, 40.) It may be supposed that none of these characteristics or results was thought to present any real problem at the time the Government was persuading this Court, in *Doude*, to uphold that section. Doubtless the same argument was there advanced which we may read in the Government's brief today, that Congress enacted 9(h) under the same compulsions which we are now told prompted the adoption of 504, namely, that the provision was essential to deal with "a grave threat to our national economy" (Govt. Br. 8), "in the interest of public order" (Govt. Br. p. 13). Fifteen years have elapsed since *Doude*, during nine of which 9(h) proved to be wholly ineffectual, leading to its being discarded in 1959; and the remaining six constitute the period during which, except for the present case, 504 has been unused in regard to Communists. Yet nothing has occurred to suggest that the founda-

tions of the Republic have been imperiled. Experience and the lapse of time have served only to emphasize the slenderness of the reed upon which this Court was induced in *Doubs* to accept a premise from which increased encroachment on constitutionally protected rights might derive encouragement.

There is nothing to prevent this Court from overruling *Doubs*. The doctrine of "*stare decisis*" is not, like the rule of *res judicata*, a universal, inexorable command" (*Burnet v. Coronado Oil & Gas Co.* [1932], 285 U.S. 393, 405, dissenting opinion of Mr. Justice Brandeis). In the light of experience and fresh opportunity for reflection, this Court has not infrequently overruled its constitutional decisions.²⁰ More than a century ago, Chief Justice Taney stated his position that

"it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." *Smith v. Turner* (1849), 7 How. (48 U.S.) 283, 470).

The tragic consequences of permitting a wrong decision in the area of the basic freedoms to influence the development of national life for any considerable period of time have been cogently summarized for a unanimous Court by the Chief Justice in *Brown v. Board of Education* (1954), 347 U.S. 483 (overruling

²⁰For a list of such cases, see dissenting opinion of Mr. Justice Brandeis in *Burnet*, *supra*, at pp. 407, n. 2 and 409, n. 4.

Plessey v. Ferguson (1896), 163 U.S. 537.) In *Plessey*, as in *Doubs*, the error of the course adopted was penetratingly delineated in powerful words of dissent. It need not require the passage of decades before a mistake is rectified. This was shown when *Minersville School District v. Gobitis* (1940), 310 U.S. 586 and *Jones v. City of Opelika* (1942), 316 U.S. 584 were re-examined and overruled in the space of three years: *Murdock v. Commonwealth of Pennsylvania* (1943), 319 U.S. 105; *Jones v. City of Opelika* (1943), 319 U.S. 103; and *West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624.

The attempt to justify such legislation as 504 by the claim that Congress is confronted with a threat of "Communist control of labor unions" (Goyt. Br. 18), is strongly suggestive of similar arguments that were advanced to support similar claims of the threat of existing danger to the state, and which produced similar solutions at the outset. The Germany of Hitler abandoned democratic government and exerted the force of the state in accordance with the noxious theory that the state is and of right should be all-powerful, and that Man's only role is to serve it. We do not imply that the impact of *Doubs* is to be mentioned in the same breath with the awful consequences that befell the people of Germany when the rights of the individual were subordinated to the "higher" interests of the state. But any doctrine which permits Congressional experimentation with totalitarian methods of solving political problems by stripping minority groups, and individuals belonging to such groups, of substantial

liberties and freedoms, can only be productive of serious mischief to the country as a whole, and to all of the people in it. It is a pernicious doctrine, and it cannot be squared with the philosophy upon which the Constitution is based.²¹

"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority." (*West Virginia State Board of Education v. Barnette* [1943], 319 U.S. 624, 641.)

²¹"It must be acknowledged that the unrestrained liberty of political association has not hitherto produced, in the United States, the fatal results which might perhaps be expected from it elsewhere. The right of association was imported from England, and it has always existed in America; the exercise of this privilege is now incorporated with the manners and customs of the people. At the present time, the liberty of association has become a necessary guaranty against the tyranny of the majority.

"The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." (Alexis De Tocqueville, "Democracy in America", The New American Library, 1956, pp. 97 and 98.)

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.²²

Dated, San Francisco, California,

March 12, 1965.

Respectfully submitted,

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²²Contrary to the assertion of the Government (Govt. Br. 47; ft. 16), Judge Hamley was eminently correct in his view that the nature of the executive board on which Brown served, presented a question of fact to be submitted to the jury. Congress has no more right to force acceptance upon the courts of a label called "executive board" whose applicability is irrefutably presumed in every case brought to trial, regardless of what the facts may be, than to legislate against speech as though it were "conduct", or to strip constitutional protections from a trial on a criminal charge by treating the subject matter as though it were adopting a mere "regulation". In this respect, the term "executive board" in the statute bears as little relationship to the evil which Congress was supposedly trying to reach, as Brown's presence at a meeting of the union's executive board does to the possible disruption of commerce. It is a fair assumption that the Government's vigorous opposition at the trial to the elicitation of any evidence concerning the true powers of the local executive board and the limitations thereon, may have proceeded from acquaintance with the fact that the board was executive in name only, utterly powerless in fact to call a strike, political or otherwise.

The fact, however, that the statute denies Sixth Amendment rights should not preclude consideration of other respects in which the legislation is fatally defective: here, as the majority opinion written by Judge Merrill shows, because of the substantial abridgements of rights guaranteed by the First and Fifth Amendments. (See *United States v. Gainey*, this Term No. 13, decided March 1, 1965, dissenting opinion of Mr. Justice Black, based on both Fifth Amendment and Sixth Amendment rights.)

No. 399

Office Supreme Court, U.S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

UNITED STATES OF AMERICA,

Petitioner,

v.

ARCHIE BROWN.

**BRIEF AMICUS CURIAE SUBMITTED BY
EMERGENCY CIVIL LIBERTIES
COMMITTEE**

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
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Statement

The *amicus curiae*, Emergency Civil Liberties Committee, is an unincorporated association organized for the purpose of protecting the civil liberties and civil rights of the people of the United States, with particular reference to the rights guaranteed by the First, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. Among other things, the *amicus* assists in the prosecution and defense of litigation in the courts of the United States and of the several states where civil liberties issues are at stake. The Committee also files, from time to time, *amicus curiae* briefs in cases pending in this and other courts in which such issues appear to be of substantial constitutional importance.

This brief will be confined to the issue of the constitutionality of § 504 of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. §.504).

POINT I

The decision in *American Communications Association v. Douds*, 339 U. S. 382, does not support the legislation in question.

A.

The Government's exclusive reliance is on *American Communications Association v. Douds*, 339 U. S. 382. No other direct authority is cited by it in its brief to this Court and no other significant support is claimed.

It cannot be seriously contended that § 504 does not represent a significant and far-reaching extension of the *Douds* doctrine. Indeed, the enactment of § 504 and the ensuing prosecution of petitioner Brown provide a classic illustration of the insidious nature of a judicial decision which permits the invasion, even with some apparent justification, of areas of free speech and association. One encroachment on our liberties is inevitably followed by others and unless this Court checks the process, large sectors of our freedom may be lost. We think that in *Douds* this Court permitted a substantial and, we respectfully submit, unjustifiable interference with First Amendment rights; it should not now compound the evil by extending the rule of that case to an even more serious attack on the basic rights of all of us.

When *Douds* was argued before this Court, the petitioner contended that the statute, in effect, made it impossible for a Communist to hold union office. Not so, responded the Government, which sought to justify the statute on the ground that it was limited to the denial of the facilities of the National Labor Relations Board to a union which elected a Communist to office, providing therefore only an indirect restraint on freedom of association and freedom of speech. Thus, in its brief to this Court in the *Douds* case, the Government said at page 65:

“ * * * Because the statute [i.e., § 9(h) of the Act of 1947] does not in law or in fact prohibit labor

organizations whose officers do not comply with the affidavit provision from functioning, the statute cannot be said even indirectly to deny to anyone the right to act as officer of a labor union, or deny to union members the right to select any officers of their own choosing."

In answering the contention that § 9(h) abridged First Amendment rights, the Government said:

"The short answer to this contention is that even assuming that Congress may not place any restriction upon the right of a union officer to be a Communist, to believe in Communism or to engage in political activity, Congress may, in creating an agency designed to further collective bargaining and eliminate industrial strife, deny resort to that agency to those who, in the reasonable judgment of Congress, would utilize it to frustrate rather than to attain the statutory objections."

And, finally, the Government, in considering alternatives to § 9(h), said:

"Another alternative would be flatly to forbid Communists and persons believing in the overthrow of the Government to be officers of labor organizations. This would have been much more drastic than the affidavit requirement, and might have raised more difficult legal problems."

This Court, while recognizing that the sanctions of § 9(h) were more significant than the Government argued, rejected the petitioner's view of the effect of the statute as an extreme position. It could not consider § 9(h) "a licensing statute prohibiting those persons who do not sign the affidavit from holding union office" (*American Communications Association v. Douds*, *supra*, p. 390). The Court further noted at p. 402 that:

"The statute does not prevent or punish by criminal sanctions the making of a speech, the affiliation with any organization, or the holding of any belief."

We are now confronted with the "more drastic" legislation and the "more difficult legal problems" of which the Solicitor General warned in his *Douds* argument and with the extreme which the Court said was *not* faced in the *Douds* case.* It is erroneous, therefore, to argue that the *Douds* decision, even if read in a vacuum, can support the Government in this case.

But the decision cannot be read in a vacuum. It must be read in the light of more recent decisions of this Court. One line of authority consists of *Dennis v. United States*, 341 U. S. 494; *Wieman v. Updegraff*, 344 U. S. 183; *Yates v. United States*, 354 U. S. 298; *Scales v. United States*, 367 U. S. 203 and *Noto v. United States*, 367 U. S. 290. These cases hold that mere membership in the Communist Party is not illegal and that even public employment may not be denied to a person because of his party membership, without more. Membership must be combined with other elements if it is to be punished through penal or civil sanctions. The *Yates*, *Scales* and *Noto* cases found that membership must be combined with activity which is not constitutionally protected before it can be punished criminally. The *Wieman* case held that membership must be combined with *scienter* before it can operate to bar the civil sanction of the denial of public employment. Neither *scienter* nor unlawful Communist activity are required by this statute, or shown by this record.

The other line of cases decided since *Douds* relates to the meaning of the freedom of association guaranteed by the First Amendment. Cases such as *Bates v. Little Rock*, 361 U. S. 516, *National Association for the Advancement of Colored People v. Alabama*, 357 U. S. 449 and *National Association for the Advancement of Colored People v. Button*, 371 U. S. 415, all stand for the proposition that the right of persons to band together to secure their political, social or economic rights is an essential element of

* And see footnote 11 in *Aptheker v. Secretary of State*, — U. S. —, 32 Law Week 4611, 4615.

our democracy and that government interference with such right will not be permitted, absent a showing of some activity which is not constitutionally protected.

Read in the light of these cases, the *Douds* case offers but frail support for the legislation under consideration here.

B.

The *Douds* decision itself stands on somewhat unsure footing. It was decided by a truncated Court of six members, four of whom wrote opinions. Only three of the justices approved the legislation in full.

Section 9(h) was based on a congressional finding that Communists instigate political strikes and that hence the Government had an interest in discouraging unions from electing Communists to office—an interest weighty enough to justify an invasion into preferred First Amendment rights. This in itself is a doctrine of questionable validity as the dissenting opinion of Mr. Justice Black forcefully points out. The *only* direct evidence then before Congress that Communists do instigate political strikes was the testimony of a single man, Louis Budenz. He asserted that two strikes in 1940 and 1941, at the plants of Allis-Chalmers Company and the North American Aviation Company, had been led by Communists and that the motivation was political rather than economic. We know of no other evidence presented to any committee of Congress at the time of the passage of § 9(h) and we know of none since.

It seems absurd that the testimony of a single witness who, at the time, was earning his living as an informer for the Government, should be permitted to justify not only § 9(h) but successive statutes such as § 504 without any evidence at all of the current policies or views of the Communist Party with respect to political strikes and without any requirement of activity on behalf of the individual officer involved to establish that he holds, or acted on, the

views which were allegedly those of the Communist Party a quarter of a century ago.

This Court has recognized from time to time that emergency legislation will not be permitted to stand after the emergency has ceased to exist. *Chastleton Corp. v. Sinclair*, 264 U. S. 543; *East New York Savings Bank v. Hahn*, 326 U. S. 230; *Bauer v. United States*, 244 F. 2d 794 (C. A. 9, 1957). It is equally unreasonable to permit a congressional finding to justify restrictions upon freedom of speech and association for an indefinite time on the basis of testimony that is not only stale but uncorroborated at the time it was given.

We recognize, of course, that this Court cannot, as an initial proposition, weigh the evidence cited in support of Congressional findings. However, in view of the fact that the rights involved here are rights essential to the continued existence of a democratic government, this Court should not permit the extension of a doubtful doctrine which was in the first place founded upon highly questionable findings.

POINT II

Section 504 of the Act of 1959 is unconstitutional.

Membership in the Communist Party, without more, is lawful under the Smith Act; it seems clear from the decisions in *Yates*, *Scales* and *Noto*, *supra*, that mere membership is constitutionally protected. Certainly respondent's conduct in becoming a member and officer of a union is likewise constitutionally protected. It is difficult to see a theory upon which this combination of two constitutionally-protected activities can be made subject to criminal penalties.

This Court, in the *Noto* decision, said:

" * * * the mere abstract teaching of Communist theory, including the teaching of the moral pro-

priety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently pervasive to lend color to the otherwise ambiguous theoretical material regarding Communist Party teaching, and to justify the inference that such a call to violence may fairly be imputed to the Party as a whole, and not merely to some narrow segment of it.

"Surely the offhand remarks that certain individuals hostile to the Party would one day be shot cannot demonstrate more than the venomous or spiteful attitude of the Party towards its enemies, and might indicate what could be expected from the Party if it should ever succeed to power. The 'industrial concentration' program, as to which the witness Regan testified in some detail, does indeed come closer to the kind of concrete and particular program on which a criminal conviction in this sort of case must be based. But in examining that evidence it appears to us that, in the context of this record, this too fails to establish that the Communist Party was an organization which presently advocated violent overthrow of the Government now or in the future, for that is what must be proven. * * * " (p. 298)

Noto spoke at Communist Party meetings, distributed Communist Party literature, openly advocated the doctrines of Marxism-Leninism and spoke in terms of shooting class enemies of the Communist Party. His activities were held to be constitutionally protected. Brown, on this record, did nothing but become an officer of his union. How can that activity be punished?

We have no desire to duplicate the argument made by the prevailing opinions in the Court of Appeals or the argument presented to this Court by the respondent. The unconstitutionality of the legislation seems so clear that not much more is required than a statement of the nature of the legislation and its application to this case.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

February 23, 1965.

Respectfully submitted,

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